89-216

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN F. LAVERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Where a manufacturer of juice products and its suppliers of apple concentrate were charged with a single conspiracy and mail fraud scheme to introduce adulterated and misbranded juice into interstate commerce in violation of the Federal Food, Drug and Cosmetics Act, would acquittal be required as a matter of law if the suppliers intended, throughout the time they sold concentrate to the manufacturer, to defraud the manufacturer by artfully concealing the adulterated nature of their concentrate and passing it off as pure apple juice concentrate?

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In the
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OCTOBER TERM, 1989

JOHN F. LAVERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

John F. Lavery petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit rendered in this case on March 29, 1989.

Opinions Below

The opinion of the Court of Appeals (A. 3)[1] appears at 871 F.2d 1181 (2d Cir. 1989).[2] The relevant opinion of the district court (A. 80) appears at 659 F. Supp. 1487 (E.D.N.Y. 1987).

Jurisdiction

The order of the Court of Appeals affirming in part and reversing in part the judgment below (A. 1) was entered on March 29, 1989. Petitioner's timely request for a rehearing

[1] Numerical references preceded by "A." refer to the Appendix.

[2] The parties to the appeal in the United States Court of Appeals for the Second Circuit were appellants Niels L. Hoyvald and John F. Lavery and respondent United States of America.

or rehearing *en banc* was denied on June 8, 1989 (A. 79), and this petition for certiorari was filed within sixty (60) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

Title 18, Section 371 of the United States Code, provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency therof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Introduction

Beech-Nut Nutrition Corporation, its president, Niels L. Hoyvald, its vice-president of operations, petitioner John F. Lavery, and its suppliers of apple concentrate were indicted in the Eastern District of New York on charges of conspiracy to violate the Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 331(a), (k) and 331(b) (18 U.S.C. §371), mail fraud (18 U.S.C. §§ 1341 and 2), and substantive violations of the FDCA (21 U.S.C. §§ 331, 333(b), 342, 343, and 18 U.S.C. §2). After a jury trial before Judge Thomas C. Platt, petitioner was found guilty as charged.[3] On appeal, the United States Court of Appeals for the Second Circuit affirmed petitioner's convictions for conspiracy and mail fraud, but reversed his convictions on

[3] Co-defendant Niels L. Hoyvald was convicted of certain FDCA counts, but the jury deadlocked on the conspiracy and mail fraud charges against Mr. Hoyvald and a mistrial was declared as to those counts. The charges against Beech-Nut and the supplier defendants were disposed of through pleas.

all of the FDCA counts. *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (2d Cir. 1989). Petitioner seeks review of the partial affirmance by the Court of Appeals of the judgment of conviction below.

Statement of the Facts

Count One of the Indictment charged a single conspiracy between Beech-Nut (including petitioner) and its apple concentrate suppliers to violate the Food, Drug and Cosmetic Act (Indictment ¶10).[4] It alleged, in relevant part, that:

(a) The suppliers, with intent to defraud and mislead, introduced adulterated and misbranded foods, labelled as and otherwise represented to be apple juice concentrate, into interstate commerce. Indictment ¶¶ 11, 14, 15.

(b) The suppliers shipped foods mislabelled as and otherwise misrepresented to be apple juice concentrate to Beech-Nut. Indictment ¶¶ 16 a, e.

(c) The Beech-Nut defendants "would ignore and suppress information which showed that the apple juice concentrate . . . purchased from [the suppliers] was adulterated and misbranded, *based on testing conducted by Beech-Nut's own scientists and outside testing laboratories.*" Indictment ¶13(A) (emphasis added).

(d) The Beech-Nut defendants, with intent to defraud and mislead, introduced adulterated and misbranded foods, labelled as and otherwise represented to contain apple juice, into interstate commerce. Indictment ¶¶ 12, 14, 15.

The district court rejected petitioner's pretrial contention that the indictment improperly alleged multiple conspira-

[4] Similarly, Counts Two through Twenty-One of the Indictment charged a single mail fraud scheme involving all of the defendants (Indictment ¶18).

cies in a single count—one among the suppliers to defraud Beech-Nut and other purchasers of concentrate, and a second among Beech-Nut defendants to ignore the adulterated nature of the concentrate and defraud purchasers of apple juice. The court held that the indictment properly alleged a single conspiracy with multiple objects. A. 87-90.[5]

At trial, there was ample evidence that the suppliers were engaged in a very sophisticated, ongoing scheme to defraud Beech-Nut and numerous other manufacturers of juice products. These suppliers created an artificial product which was carefully designed to mimic the appearance and the chemical properties of apple concentrate, and sold it to the manufacturers as the genuine article. At the close of the Government's case, therefore, the defense moved pursuant to Rule 29 for acquittal on Count One on the ground that the Government had failed to prove the single broad conspiracy alleged in the indictment. Counsel argued:

> It is . . . not a [single] conspiracy if the supplier defendants entered into a conspiracy to defraud everybody out there including all the purchasers, be it A&P or Beech-Nut. If Beech-Nut subsequently became aware of it through its testing and decided it was a good thing, that would be a separate conspiracy because there is no indication that the supplier defendants were aware they were not defrauding Beech-Nut.

The Government did not dispute petitioner's contention that the suppliers intended to defraud Beech-Nut, but argued that a single conspiracy to defraud the public was established by proof that (1) the suppliers knew that Beech-Nut would be selling their product to the American public, and (2) Beech-Nut continued to buy concentrate

[5] Petitioner raised a parallel claim with respect to the mail fraid counts. The district court held that the indictment properly alleged a single scheme to defraud where the different co-schemers played different roles. A. 91-93.

from the suppliers after discovering that it was phony. The district court denied the motion for acquittal, holding that proof that Beech-Nut "adopted and aided and abetted" the suppliers' conspiracy to defraud the public was sufficient to establish a single conspiracy, and that the suppliers' purpose to defraud Beech-Nut was irrelevant.[6]

Petitioner then requested the district court to submit the following theory of defense instruction to the jury:

> If you find that the concentrate suppliers in fact intended to defraud Beech-Nut throughout the time that they sold concentrate to Beech-Nut, then you must acquit [the defendants] on Count 1.

The court refused to give this instruction on the ground that it was incorrect as a matter of law.[7]

The Court of Appeals upheld the district court's ruling that petitioner's proposed theory of defense instruction did not accurately reflect the law (A. 40),[8] thereby holding that petitioner could be convicted of conspiracy with Beech-Nut's suppliers of apple concentrate to introduce adulterated and misbranded juice into interstate commerce, *notwithstanding* the suppliers' intent to defraud Beech-Nut by concealing the adulterated nature of their concentrate and passing it off as pure apple juice concentrate.

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[6] A parallel argument concerning the mail fraud counts was raised and rejected.

[7] An analogous instruction concerning the mail fraud counts was sought and refused.

[8] The Court of Appeals treated petitioner's arguments with respect to the conspiracy and mail fraud counts as a single, unified claim, making no distinction between a conspiracy and a multi-defendant mail fraud scheme in deciding the issue on appeal. 871 F.2d at 1191-93.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' holding fundamentally alters the definition of a conspiracy under federal law.

The crime of conspiracy involves the *agreement of two or more persons* to commit a criminal act or acts. 18 U.S.C. §371; *Iannelli v. United States,* 420 U.S. 770, 777 n. 10 (1975). It requires proof of an "agreement *among* the conspirators." *United States v. Falcone,* 311 U.S. 205, 210 (1940) (emphasis added). As the Second Circuit explained in *United States v. Rosenblatt,* 554 F.2d 36 (2d Cir. 1977), the federal courts have not adopted the Model Penal Code's "unilateral" formulation of conspiracy, whereby "conspiracy is defined in terms of one person's agreeing *with* another," but retained the traditional, common law requirement of "an agreement *among* or *between* two or more people." *Id.* at 38 n.2; *see also, United States v. Gaviria,* 740 F.2d 174, 184-85 (2d Cir. 1984); *United States v. Harris,* 733 F.2d 994, 1005-06 (2d Cir. 1984).

A corollary of this basic principle of conspiracy law is that "A" cannot be guilty of "conspiring" with "B" unless "B" conspired with "A":

> Since the act of agreeing is a group act, unless at least two people commit it, no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Although he may possess the requisite criminal intent, there has been no criminal act.

Developments in the Law—Criminal Conspiracy, 72 Harvard L. Rev. 920, 926 (1959). In accordance with this reasoning, the circuits have unanimously declared that no conspiracy exists when a person "conspires" with a government agent who only pretends to agree to break the law.[9]

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[9] *See, United States v. Barnes,* 604 F.2d 121, 161 (2d Cir. 1979), *cert. denied,* 446 U.S. 907 (1980); *United States v. Chase,* 372

(footnote continued on following page)

Such reasoning is directly applicable to petitioner's case as well: petitioner cannot have agreed with Beech-Nut's suppliers to violate the FDCA unless those suppliers agreed with him. This means, at the very least, that the suppliers must have had some awareness that the conspiratorial agreement or understanding extended beyond themselves and included manufacturers to whom they sold concentrate.[10] The suppliers, however, understood nothing of the sort. So long as they intended to defraud petitioner (and other manufacturers) by misrepresenting the true nature of their concentrate, they necessarily believed that the conspiracy was strictly confined to themselves. To say that the suppliers *agreed* with petitioner to sell *adulterated* juice when trying all the while to *fool* him into thinking the juice was *unadulterated* is paradoxical and absurd.

United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), upon which the Second Circuit based its holding, has in fact no bearing on the issue presented here. In petitioner's case, the question is whether fraud undermined the basis for an inference of

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(*footnote continued from preceding page*)

F.2d 453, 459 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965); *United States v. Pennell*, 737 F.2d 521, 536 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Moss*, 591 F.2d 428, 434 n.8 (8th Cir. 1979); *United States v. Escobar de Bright*, 742 F.2d 1196, 1199-1200 (9th Cir. 1984); *United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985); *United States v. Tombrello*, 666 F.2d 485, 490 n.3 (11th Cir.), *cert. denied*, 456 U.S. 994 (1982).

[10] *See, e.g., United States v. Bynum*, 485 F.2d 490, 495 (2d Cir.), *vacated and remanded on other grounds*, 417 U.S. 903 (1974) (defining a chain conspiracy as a combination where "each level of the operation depends upon the existence of the other, and the mutual interdependence of each is *fully understood and appreciated by the other.*") (emphasis added); *United States v. Cambindo-Valencia*, 609 F.2d 603, 623 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980) (same); *United States v. Varelli*, 407 F.2d 735, 741 (2d Cir. 1969) (the crime of conspiracy requires a "concert of action, *all the parties working together understandingly*, with a single design for the accomplishment of a common purpose.") (emphasis added).

agreement between the parties and thus precluded the formation of a conspiracy. In *Finkelstein*, on the other hand, the formation and existence of a conspiracy were never in question: all defendants were parties to an *express* agreement to violate the securities laws by marketing worthless stock. The holding in *Finkelstein* thus *presupposes* the existence of a conspiracy, and deals solely with the question of a conspirator's liability for the crimes of co-conspirators who are acting in furtherance of the criminal purpose of the conspiracy but cheating their partner of the spoils. *Id.* at 520-22.[11]

Mere cheating among confirmed co-conspirators over the illegal spoils of their crime in no way implicates the legal requirements for a conspiratorial agreement. However, a merchant's intent to defraud his customer by concealing the illicit nature of his product, and hence the very existence of any criminal enterprise, is plainly inconsistent with any intent to conspire with the customer to violate the law. Therefore such fraud, unlike that practiced in *Finkelstein*, negates the *fundamental* element required for a conspiracy: an *agreement* to violate the law.[12]

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[11] This reading of *Finkelstein* is confirmed by its reliance on *United States v. Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). 526 F.2d at 522. In *Salazar*, as in *Finkelstein*, there was an express conspiratorial agreement among the parties. Two members of the conspiracy "chose to bypass [a third member] on certain transactions, and, in effect, deprive him of his share of illegal profits." 485 F.2d at 1276. Faced with the same claim as in *Finkelstein*, the Second Circuit explicitly analyzed the case in terms of a conspirator's liability for the crimes of co-conspirators in furtherance of the conspiracy. *Id.*

[12] Petitioner's argument applies somewhat differently to the mail fraud counts. A multi-defendant mail fraud scheme, like a conspiracy, requires proof that the participants shared a common goal or purpose. *Isaacs v. United States*, 301 F.2d 706, 713 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962). Petitioner could share no common purpose with suppliers whose intent was to defraud Beech-Nut. *See, United States v. Camiel*, 689 F.2d 31 (3rd Cir. 1982).

Thus, the Court of Appeals, by indiscriminately applying the rule of *Finkelstein* to petitioner's case, has redefined the very essence of conspiracy. This questionable interpretation of federal conspiracy law unjustifiably reduces the quantum of proof necessary to establish a conspiratorial agreement and thus dangerously overexpands the scope of the federal conspiracy statute. Therefore, this Court should grant petitioner a writ of certiorari and review this important issue of conspiracy law.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the judgment of conviction and remand the case for further proceedings.

Dated: New York, New York
July 31, 1989

Respectfully submitted,

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JAMES ALEXANDER BURKE
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APPENDIX

ORDER OF THE COURT OF APPEALS

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March one thousand nine hundred and eighty-nine

Present:

Hon. James L. Oakes,
Hon. Amalya L. Kearse,
Hon. Richard J. Cardamone,
Circuit Judges,

UNITED STATES COURT OF APPEALS
FILED
MAR 29 1989
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

BEECH-NUT NUTRITION CORPORATION, NEILS L. HOYVALD, JOHN F. LAVERY, ZEE KAPLANSKY, RAYMOND H. WELLS, NINA B. WILLIAMSON, SOUTH ORANGE EXPRESS, INC., DANNY A. SCHAEFFER,

Defendants,

NEILS L. HOYVALD and JOHN F. LAVERY

Defendants-Appellants

88-1287, 88-1288

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

Elaine B. Goldsmith
Clerk

/s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

ISSUED AS MANDATE:
June 16, 1989

OPINION OF THE COURT OF APPEALS

UNITED STATES of America, Appellee,

v.

BEECH-NUT NUTRITION CORPORATION, Neils L. Hoyvald, John F. Lavery, Zeev Kaplansky, Raymond H. Wells, Nina B. Williamson, South Orange Express, Inc., Danny A. Shaeffer, Defendants,

Appeal of Neils L. HOYVALD and John F. Lavery, Defendants–Appellants.

Nos. 422, 423, Dockets 88–1287, 88–1288.

United States Court of Appeals, Second Circuit.

Argued Dec. 5, 1988.

Decided March 29, 1989.

John R. Fleder, Director, Office of Consumer Litigation, U.S. Dept. of Justice, Washington, D.C. (John R. Bolton, Asst.

Atty. Gen., Washington, D.C., Andrew J. Maloney, U.S. Atty. for the E.D. of N.Y., Brooklyn, N.Y., Kenneth L. Jost, Atty., Office of Consumer Litigation, U.S. Dept. of Justice, Washington, D.C., David C. James, Thomas H. Roche, Asst. U.S. Attys., Brooklyn, N.Y., on the brief), for appellee.

Barry S. Simon, Washington, D.C. (Brendan V. Sullivan, Jr., Paul Mogin, John D. Cline, Williams & Connoly, Washington, D.C., on the brief), for defendant-appellant Hoyvald.

Steven Kimmelman (James Alexander Burke, Steven Kimmelman, P.C., New York City, on the brief), for defendant-appellant Lavery.

Before OAKES, Chief Judge,
KEARSE and CARDAMONE, Circuit Judges.

KEARSE, Circuit Judge:

Defendants Neils L. Hoyvald and John F. Lavery appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York

after a jury trial before Thomas C. Platt, *Judge*. Hoyvald was convicted on 359 counts of introducing adulterated and misbranded apple juice into interstate commerce, in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S. C. §§ 331(a) and 342(b)(1) and (2) (1982 & Supp. IV 1986). Lavery was convicted on one count of conspiracy, in violation of 18 U.S.C. § 371 (1982), 18 counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (1982), and 429 counts of introducing adulterated and misbranded apple juice into interstate commerce, in violation of 21 U.S. C. §§ 331(a), 342(b)(1) and (2), and 18 U.S.C. § 2. Each defendant was fined a total of $100,000, sentenced to concurrent prison terms of one year and one day on each count on which he was convicted, and ordered to pay the costs of prosecution. On appeal, defendants contend principally that venue as to certain counts was improper and that the district court made a variety of errors in admitting or excluding evidence and in instructing the jury. For the reasons below, we conclude that venue as

to the substantive FDCA counts was improper, and we therefore reverse defendants' convictions under 21 U.S.C. §§ 331(a) and 342(b)(1) and (2) and remand for dismissal of those counts; we affirm Lavery's conviction on the conspiracy and mail fraud counts.

I. BACKGROUND

During the period in question, Lavery was vice president in charge of operations for Beech-Nut Nutrition Corporation ("Beech-Nut" or the "Company"), a company engaged in the business of, *inter alia*, selling fruit juice products in interstate commerce. As vice president for operations, Lavery was responsible for the purchasing and processing of apple juice concentrates used in Beech-Nut's apple juice and in its "mixed juice" products. Hoyvald was first employed by Beech-Nut in 1980 and became its president and chief executive officer in April 1981. Thereafter, Lavery reported directly to Hoyvald.

The government's evidence at trial was presented principally through the testimony of present and former Beech–Nut employees, scientists and investigators employed by the Food and Drug Administration ("FDA"), and expert witnesses, and through documents from the files of Beech–Nut. The evidence, taken in the light most favorable to the government, revealed the following.

A. *Events Prior to June 25, 1982*

Beech–Nut marketed its apple juice as pure unsweetened juice, labeling and advertising it as pure fruit juice with no sugar added. It made its juices from concentrates. In 1977, Universal Juice Company ("Universal") became its sole supplier of apple juice concentrate. In October 1978, Dr. Jerome LiCari, Beech–Nut's director of research and development, received information suggesting that that concentrate might be adulterated, *i.e.*, might be made of syrups and edible substances other than, and cheaper than, apples. LiCari reported this information to Lavery.

In response, Lavery sent two employees to inspect Universal's blending operation. What the employees found, however, was only a warehouse without any blending facility. Lavery did not attempt to determine the location of the blending operation and pursue an inspection. Instead, he required Universal to give the Company a "hold harmless" agreement which was intended to protect Beech-Nut from legal claims related to the juice.

Thereafter, as a result of tests, LiCari continued to express to Lavery his concerns about the quality of the concentrate supplied by Universal; he argued that a supplier willing to adulterate the concentrate in the first place would likely have little compunction about continuing to supply adulterated product after signing a hold-harmless document. Lavery's response was that the agreement would adequately protect the Company even if the juice was adulterated.

Lavery told LiCari that Universal's price to Beech-Nut for the concentrate was 50

cents to a dollar per gallon below the price charged by the Company's previous supplier. He stated that, because of the tremendous economic pressure under which the Company was operating, he would not change suppliers unless LiCari's tests were sufficient to prove in a court of law that the concentrate was adulterated. He directed LiCari to give the testing low priority. Beech-Nut continued to buy the adulterated concentrate.

In 1979, LiCari had the concentrate analyzed by an outside laboratory. The test results showed that the concentrate consisted primarily of sugar syrup. Lavery was informed of these results but took no action. In July 1979, Lavery received a memorandum from the Company's plant manager in San Jose, California, advising him that approximately 95,000 pounds of concentrate inventory was "'funny'" and "*adulterated*," in that it was "almost pure corn syrup." (Emphasis in original.) The plant manager suggested that Beech-Nut demand its money back from the supplier. Instead, Lavery, who did not dispute the

accuracy of these reports, instructed the manager to use the tainted concentrate in the Company's mixed juices. These too were labeled 100% pure juice. The Company continued to purchase its apple juice concentrate from Universal.

On numerous occasions thereafter, Beech-Nut's scientists advised Lavery of their concerns that the apple juice concentrate was adulterated. In August 1981, LiCari sent a memorandum to Charles Jones, the Company's purchasing manager, with a copy to Lavery, stating that although the scientists had not proven that the concentrate was adulterated there was "a tremendous amount of circumstantial evidence" to that effect, "paint[ing] a grave case against the current supplier." LiCari's memorandum concluded that

> [i]t is imperative that Beech-Nut establish the authenticity of the Apple Juice Concentrate used to formulate our products. If the authenticity cannot be established, I feel that we have sufficient reason to look for a new supplier.

Lavery took no action to change suppliers. Rather, he instructed Jones to ignore LiCari's memorandum, criticized LiCari for not being a "team player," and called his scientists "Chicken Little." He threatened to fire LiCari.

In late 1981, the Company received, unsolicited, a report from a Swiss laboratory concluding that Beech–Nut's apple juice product was adulterated, stating, "[t]he apple juice is false, can not see any apple." Lavery reviewed this report, and one of his aides sent it to Universal. Universal made no response, and Beech–Nut took no action.

Both before and after becoming president of Beech–Nut in April 1981, Hoyvald too received information from several sources about the adulteration problem. In January 1981, LiCari sent copies of a memorandum to Hoyvald and Lavery expressing concern over the quality of the concentrate used to make the apple juice. In November, purchasing manager Jones raised the problem. In the spring of 1982, Paul Hillabush, the Company's director of quality assurance, advised Hoyvald not to

be surprised by adverse publicity concerning Beech-Nut's purchases of apple juice concentrate. Hoyvald took no action in response to any of these communications. Rather, he told Lavery that, for budgetary reasons, he would not approve a change in concentrate suppliers until 1983.

B. *The Events of June 25, 1982, and Thereafter*

On June 25, 1982, a detective hired by the Processed Apple Institute visited Lavery at the Beech-Nut manufacturing facility in Canajoharie, New York, and advised him that Beech-Nut was about to be involved in a lawsuit as a result of its use of adulterated concentrate and that adverse publicity would ensue. Lavery immediately terminated Beech-Nut's relationship with Universal.

Lavery dealt with the adulterated concentrate on hand in two ways. He promptly ordered that so much of Beech-Nut's inventory of concentrate as was located in New York be returned to Universal or destroyed. As to the inventory of concen-

trate located in San Jose, California, however, he allowed the California plant to continue to use it in manufacturing apple juice products.

In addition to the concentrate in New York and California, Beech–Nut had in June 1982 an inventory worth millions of dollars of finished apple products already made from the adulterated concentrate. Hoyvald realized that an inability to sell this inventory would be financially crippling to the Company, and accordingly undertook delaying tactics designed to give the Company time to sell it.

To avoid seizure of the inventory in New York by state officials in August 1982, Hoyvald had this juice moved out of state during the night. It was transported from the New York plant to a warehouse in Secaucus, New Jersey, and the records of this shipment and others were withheld from FDA investigators until the investigators independently located the carrier Beech–Nut had used. While the FDA was searching for the adulterated products but before it had discovered the Secaucus

warehouse, Hoyvald ordered virtually the entire stock in that warehouse shipped to Beech–Nut's distributor in Puerto Rico; the Puerto Rico distributor had not placed an order for the product and had twice refused to buy the product even at great discounts offered personally by Hoyvald.

Similarly, in September 1982, Hoyvald ordered a rush shipment of the inventory of apple juice products held at Beech–Nut's San Jose plant, and took a number of unusual steps to get rid of the entire stock. He authorized price discounts of 50 percent; the largest discount ever offered theretofore had been 10 percent. Hoyvald insisted that the product be shipped "fast, fast, fast," and gave a distributor in the Dominican Republic only two days, instead of the usual 30, to consider and respond to this product promotion. Further, in order to get the juice out of the warehouse and out of the country as quickly as possible, the Company shipped it to the Dominican Republic on the first possible sailing date, which was from an unusually distant port, thereby raising the freight cost to a level

nearly equal to the value of the goods themselves. Finally, this stock was shipped before Beech-Nut had received the necessary financial documentation from the distributor, which, as one Beech-Nut employee testified, was "tantamount to giving the stuff away."

Hoyvald also used Beech-Nut's lawyers to help delay the government investigation, thereby giving the Company more time to sell its inventory of adulterated juice before the product could be seized or a recall could be ordered. For example, in September 1982, the FDA informed Beech-Nut that it intended to seize all of Beech-Nut's apple juice products made from Universal concentrate; in October, New York State authorities advised the Company that they planned to initiate a local recall of these products. Beech-Nut's lawyers, at Hoyvald's direction, successfully negotiated with the authorities for a limited recall, excluding products held by retailers and stocks of mixed juice products. Beech-Nut thus eventually agreed to conduct a nationwide recall only of apple juice, and by the

time of the recall Hoyvald knew that more than 97 percent of the earlier stocks of apple juice had been sold. The Company continued to sell its mixed juice products made from the tainted concentrate until March 1983. In December 1982, in response to Hoyvald's request, Thomas Ward, a member of a law firm retained by Beech–Nut, sent Hoyvald a letter that summarized the events surrounding the apple juice concentrate problem as follows:

> From the start, we had two main objectives:
>
> 1) to minimize Beech–Nut's potential economic loss, which we understand has been conservatively estimated at $3.5 million, and
>
> 2) to minimize any damage to the company's reputation.
>
> We determined that this could be done by delaying, for as long as possible, any market withdrawal of products produced from the Universal Juice concentrate.... .... In spite of the recognition that FDA might wish to have Beech–Nut recall some of its products, management

decided to continue sales of all such products for the time being.... The decision to continue sales and some production of the products was based upon the recognition of the significant potential financial loss and loss of goodwill, and the fact that apple juice is a critical lead-in item for Beech–Nut.

Since the mixed fruit juices and other products constituted the bulk of the products produced with Universal concentrate, one of our main goals became to prevent the FDA and state authorities from focusing on these products, and we were in fact successful in limiting the controversy strictly to apple juice.

C. *The Present Prosecution*

In November 1986, Beech–Nut, Hoyvald, and Lavery, along with Universal's proprietor Zeev Kaplansky and four others (Kaplansky and these four referred to hereafter as the "suppliers"), were indicted on charges relating to the Company's sale of adulterated and misbranded apple juice products. Hoyvald and Lavery were

charged with (A) one count of conspiring with the suppliers to violate the FDCA, 21 U.S.C. §§ 331(a), (k), and 333(b) (1982 & Supp. IV 1986), in violation of 18 U.S.C. § 371; (B) 20 counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2; and (C) 429 counts of introducing adulterated and misbranded apple juice into interstate commerce, in violation of 21 U.S.C. §§ 331(a) and 333(b) and 18 U.S.C. § 2. The suppliers were also charged with introducing adulterated concentrate into interstate commerce; Hoyvald and Lavery were not charged with any substantive offense regarding the concentrate itself, either directly or as aiders and abettors.

Hoyvald and Lavery pleaded not guilty to the charges against them. Eventually, Beech-Nut pleaded guilty to 215 felony violations of §§ 331(a) and 333(b); it received a $2,000,000 fine and was ordered to pay $140,000 to the FDA for the expenses of its investigation. Kaplansky and the other four supplier-defendants also eventually pleaded guilty to some or all of the charges against them. Hoyvald and Lavery thus went to trial alone.

Prior to trial, Hoyvald and Lavery made various motions, including (1) a motion to dismiss the substantive FDCA counts against them on the ground that none of the acts on which those counts were based occurred in the Eastern District of New York, and hence venue was improper; and (2) a motion to dismiss the conspiracy count on the ground that it pleaded two conspiracies rather than a single conspiracy. In an opinion reported at 659 F.Supp. 1487 (1987), the district court denied both motions. It denied the venue motion on the ground that, since transportation is necessary for the "introduction" of goods into commerce, the FDCA offenses were continuing crimes under 18 U.S.C. § 3237(a) (1982 & Supp. IV 1986) and venue was thus proper in any district in which the offenses were begun, continued, or completed. It denied the motion to dismiss the conspiracy count, finding that the indictment adequately alleged a single conspiracy albeit with multiple objectives.

The trial began in November 1987 and continued for three months. The govern-

ment's evidence included that summarized above. Hoyvald's principal defense was that all of his acts relating to the problem of adulterated concentrate had been performed on the advice of counsel. For example, there was evidence that the Beech-Nut shipment of adulterated juices from its San Jose plant to the Dominican Republic followed the receipt by Hoyvald of a telex sent by Sheldon Klein, an associate of the law firm representing Beech-Nut, which summarized a telephone conference between Beech-Nut officials and its attorneys as follows:

> We understand that approximately 25,000 cases of apple juice manufactured from concentrate purchased from Universal Juice is [*sic*] currently in San Jose. It is strongly recommended that such product and all other Universal products in Beech-Nut's possession anywhere in the US be destroyed before a meeting with [the FDA] takes place.

Hoyvald and Klein testified that they had a follow-up conversation in which Klein told Hoyvald that, as an alternative, it would be

lawful to export the adulterated apple juice products.

At the close of the evidence, two counts of mail fraud were dismissed at the government's request; the remaining counts were submitted to the jury. The jury returned a verdict of guilty on all of the counts against Lavery. It returned a verdict of guilty against Hoyvald on 359 counts of adulterating and misbranding apple juice, all of which related to shipments after June 25, 1982. It was unable to reach a verdict on the remaining counts against Hoyvald, which related to events prior to that date. These appeals followed.

II. DISCUSSION

On appeal, defendants contend principally (1) that the Eastern District of New York was not a proper venue for prosecution of the substantive counts under the FDCA; (2) that the court improperly curtailed their presentation of evidence in support of their advice-of-counsel defense; and (3) that the court failed to give the jury proper instructions with respect to that de-

fense and with respect to the matter of conscious avoidance. In addition, Lavery contends that the proof at trial did not substantiate the charge that he and Beech-Nut's suppliers were members of a single conspiracy to violate the FDCA; both defendants contend that that their rights under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1982 & Supp. IV 1986), were violated and that the court made various other errors in the admission of evidence or the conduct of the trial. We have considered all of the arguments made by defendants on these appeals and find merit only in the contention that venue as to the substantive FDCA counts was improper.

A. *Venue as to the Substantive FDCA Counts*

Appellants argue that their convictions on the substantive FDCA counts must be reversed because the government did not show that venue in the Eastern District of New York was proper. For the reasons below, we are constrained to agree.

The Sixth Amendment to the Constitution provides that the accused in a criminal prosecution has the right to be tried in the "district wherein the crime shall have been committed." *See also* Fed.R.Crim.P. 18. The burden is on the government to prove that the crime was committed in the district in which the prosecution is brought, *see, e.g., United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir.), *cert. denied*, 469 U.S. 918, 105 S.Ct. 297, 83 L.Ed.2d 232 (1984); *United States v. Panebianco*, 543 F.2d 447, 455 (2d Cir.1976), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1129, 51 L.Ed.2d 553 (1977), and when a defendant is charged in more than one count, venue must be proper with respect to each count, *see, e.g., United States v. Bozza*, 365 F.2d 206, 220–22 (2d Cir.1966); *United States v. Davis*, 666 F.2d 195, 198 (5th Cir. Unit B 1982).

When a crime consists of a single non-continuing act, it is "committed" in the district where the act is performed. *See, e.g., United States v. Anderson*, 328 U.S. 699, 703, 66 S.Ct. 1213, 1216, 90 L.Ed. 1529 (1946); *United States v. Busic*, 549

F.2d 252, 259 (2d Cir.1977). When a crime is an offense that is not unitary but instead spans space or time, it may be governed by 18 U.S.C. § 3237(a), which provides that,

> [e]xcept as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be ... prosecuted in any district in which such offense was begun, continued, or completed.

That section goes on to provide that "[a]ny offense involving ... transportation in interstate or foreign commerce ... is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be ... prosecuted in any district from, through, or into which such commerce ... moves." *Id.*

If the federal statute defining an offense does not indicate explicitly where Congress believes the criminal act is committed, "the *locus delicti* must be determined from the nature of the crime alleged and the location

of the act or acts constituting it." *United States v. Anderson*, 328 U.S. at 703, 66 S.Ct. at 1216. "It is, of course, necessary in order to decide where the crime is committed to ascertain what duty it was, the failure to perform which constitutes the crime, and also what acts of the defendant constituted the violation." *Id.* at 705, 66 S.Ct. at 1217. Accordingly, we have stated that

> the test [for constitutional venue] is best described as a substantial contacts rule that takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding,

United States v. Reed, 773 F.2d 477, 481 (2d Cir.1985), and we have noted that it is helpful to examine the "key verbs" used by the statute in defining the offense, *United States v. Chestnut*, 533 F.2d 40, 46–47 (2d Cir.), *cert. denied*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 93 (1976).

The substantive FDCA provision at issue here prohibits, in pertinent part, "[t]he introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated or misbranded." 21 U.S.C. § 331(a). The offense described by this section consists of "put[ting] into the stream of interstate commerce adulterated or misbranded" food, *United States v. Dotterweich*, 320 U.S. 277, 284, 64 S.Ct. 134, 138, 88 L.Ed. 48 (1943), or the "send[ing of] illicit goods across state lines," *id.* at 285, 64 S.Ct. at 138. Although the offense is committed at the moment the goods are "introduc[ed]" or "put" into commerce, we do not view the terms "introduction" and "delivery for introduction" as limited to the physical act of shipping the goods from the original warehouse or plant of the manufacturer. Rather, deeming those terms to encompass also acts of the defendant that cause or direct the shipment of the goods, we have held that venue is proper in a district from which the defendant caused the unlawful introduction of goods into commerce, even though the physical ship-

ment commenced from a different district. *United States v. Taller*, 394 F.2d 435, 437–38 (2d Cir.), *cert. denied*, 393 U.S. 839, 89 S.Ct. 115, 21 L.Ed.2d 109 (1968).

The district court, noting that § 3237 includes as continuing offenses those crimes that "involv[e]" transportation, and that the shipment of goods in commerce plainly involves transportation, concluded that § 331(a) defines an offense that is "continuing." *See* 659 F.Supp. at 1493–94. Though this interpretation may be correct, we need not decide in this case whether a § 331(a) violation is a continuing offense within the meaning of § 3237, for the effect of § 3237 is to make an offense triable "in any district in which such offense was begun, continued, or completed," or "in any district from, through, or into which such commerce ... moves," 18 U.S.C. § 3237, and these provisions do not encompass the actions of Hoyvald and Lavery that were proven at the trial of the present case.

Unlike the defendant in *United States v. Taller*, neither Hoyvald nor Lav-

ery was shown to have conducted business from the Eastern District of New York. So far as appears from the record, these defendants were not present in that district but rather operated either from Beech-Nut's corporate headquarters in Pennyslvania, or from its juice manufacturing operation in Canajoharie in the Northern District of New York. Thus, though Hoyvald and Lavery were shown to have caused the introduction of adulterated juice into interstate commerce, that introduction was not caused by them from the Eastern District. Hence, it does not appear that their substantive FDCA offenses were begun, continued, or completed in the Eastern District of New York.

Further, there was no suggestion in the record that Beech-Nut had any facility for the fabrication, storage, or shipment of apple juice in the Eastern District. Insofar as the juice was fabricated in New York, that occurred in the Northern District, and the juice was shipped from that district. Nor was there any proof that the juice in question was shipped "into" the Eastern

District of New York. And though the documents revealed many destinations for the juice, including cities in New Jersey, Connecticut, Vermont, and Massachusetts, there was no evidence that in order to reach its destination from Canajoharie, any of the juice traveled "through" the Eastern District of New York. Thus, there was no proof of a factual predicate for deeming this a prosecution "in any district from, through, or into which [the adulterated and misbranded juice] ... move[d]."

The government argues that prosecution in the Eastern District was permissible because Universal and its brokers were located in the Eastern District, and defendants' subordinates (1) telephoned the brokers to place orders for the adulterated apple juice concentrate, and (2) mailed confirmations for these concentrate orders into the Eastern District. We disagree, for these communications were not part of the offense of introducing the offending juice into commerce but were merely prior and preparatory to that offense. Whether the crime be continuing or noncontinuing, ven-

ue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense. *See, e.g., United States v. Bozza*, 365 F.2d at 220–21 (noncontinuing crime of receipt of stolen goods); *United States v. Davis*, 666 F.2d at 200 (continuing crime of possession of drugs with intent to distribute).

Bozza involved a prosecution in the Eastern District of New York for, *inter alia*, the noncontinuing offense of receipt of stolen goods. The only connection of the alleged receiver of the goods with that district was that he had gone there for an unspecified purpose and had made and received calls there to arrange a meeting and negotiate price with respect to the goods; he had then gone from the Eastern District to the Southern District, where he actually received the stolen goods. We concluded that venue in the Eastern District as to this count was improper. We noted that

> the cases draw a distinction between a continuing offense which is "held, for venue purposes, to have been committed

> wherever the wrongdoer roamed," ... and "a single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere."

365 F.2d at 220 (citations omitted). We rejected the government's contention that "the making of a contract to receive [w]as the 'beginning' of a receiving," *id.*, concluding instead that an act that was merely preparatory to the offense was not part of the offense. *See also United States v. Chestnut*, 533 F.2d at 47 (court must "decide 'when the defendant's actions have progressed to the point where a court can confidently conclude that [the offense in question] has been committed' ") (quoting *United States v. Bithoney*, 472 F.2d 16, 23 (2d Cir.), *cert. denied*, 412 U.S. 938, 93 S.Ct. 2771, 37 L.Ed.2d 397 (1973)). In *Bozza*, we concluded that

> [t]o such extent as the issue is doubtful, it is best to resolve the doubt in favor of a construction which will ensure trial where witnesses to the receiving are

> more likely to be present; otherwise the mere happenstance of a telephone call from a district, possibly remote, where a defendant chanced to be, could deprive him of the protection of the Sixth Amendment.

365 F.2d at 221.

The principle that preparatory acts alone are insufficient to support venue applies also to continuing offenses. Though § 3237 traces an offense from inception to completion, its thrust is entirely forward-looking; it contains no retrospective provision establishing venue in a district in which the defendant performed only acts that preceded the inception of the offense. In *United States v. Davis*, 666 F.2d at 199–200, the defendants were prosecuted in the Middle District of Georgia for possession of narcotics with intent to distribute, a crime that may be a continuing offense within the meaning of § 3237. They argued that venue on that count was improper because the narcotics had never physically entered that district. The government contended that venue was proper be-

cause the defendants had made arrangements while in that district for the acquisition of the drugs and had intended that the drugs be returned to that district for ultimate distribution at the street level. The Fifth Circuit rejected the government's contentions and reversed for improper venue because the offense itself had not been committed in that district. Like the Fifth Circuit, we find no authorization in § 3237 for venue in a district whose sole connection with the offense in question is that it was a site of preparation for the offense.

These principles require that we reverse the convictions of Hoyvald and Lavery on the substantive FDCA counts. The mailings and telephone calls into the Eastern District, relied on by the government, were orders for concentrate that would later be used in Beech-Nut's fabrication of apple juice and thus were merely preparatory to the eventual introduction of the juice into commerce. Though the orders for the adulterated concentrate were undoubtedly acts in furtherance of the conspiracy, they were not part of the substantive § 331(a)

offenses with which Hoyvald and Lavery were charged. Plainly if the trial record contained evidence only of defendants' orders for the concentrate, the proof would be insufficient to support a conviction for introduction of the juice eventually made from the concentrate. And if the record contained no evidence of the orders for the concentrate, it would nonetheless contain sufficient proof of the unlawful introduction of adulterated juice.

In sum, we conclude that the substantive FDCA offenses with which Hoyvald and Lavery were charged were not committed, or even begun, in the Eastern District of New York, and that the inclusion of those charges in the present prosecution violated their constitutional venue rights. Accordingly, we reverse their convictions on the substantive FDCA counts, and remand for dismissal of those counts.

B. *The Challenge to the Charge of a Single Scheme or Conspiracy*

Count 1 of the indictment alleged that all of the defendants had, with intent to de-

fraud, participated in a single conspiracy to violate the FDCA's prohibition against the introduction of adulterated and misbranded foods in interstate commerce. Counts 2–21 alleged that all defendants had used the mails in furtherance of their fraudulent scheme. Lavery contends that he is entitled to reversal of his convictions for mail fraud and conspiracy because there was no proof that there was a single agreement to which both Lavery and the concentrate suppliers were parties. He argues that the evidence showed at best two separate schemes—one to introduce adulterated concentrate and the other to introduce adulterated juice—and that since the suppliers' aim was to defraud Beech–Nut, as a matter of law there could not have been a conspiracy between Lavery and the suppliers. We disagree.

The gist of conspiracy is, of course, agreement. In order to support a conviction for conspiracy, the evidence must be sufficient to permit the jury to infer that the defendant and other alleged coconspirators entered into a joint enterprise with

consciousness of its general nature and extent. *See, e.g., United States v. Alessi*, 638 F.2d 466, 473 (2d Cir.1980). When a conspiracy has been charged, the alleged coconspirators' actions may be assessed in light of their "interrelationship and interdependency" as well as "the nature and duration of the enterprise." *United States v. Alessi*, 638 F.2d at 473. Though accidentally parallel action is not enough to establish a conspiracy, and a mere buyer-seller relationship is not necessarily a conspiracy, a defendant may be deemed to have agreed to join a conspiracy

> if there is something more, some indication that the defendant knew of and intended to further the illegal venture, that he somehow encouraged the illegal use of the goods or had a stake in such use.

United States v. Zambrano, 776 F.2d 1091, 1095 (2d Cir.1985).

The agreement needed to support a charge of conspiracy need not be explicit but may be tacit. *See Direct Sales Co. v. United States*, 319 U.S. 703, 63 S.Ct. 1265,

87 L.Ed. 1674 (1943). If buyer and seller deal in a commodity that has limited legal uses, the very nature of the commodity may help to establish the parties' knowledge of and intent "to further, promote, and cooperate" in the illegal scheme. *Id.* at 711, 63 S.Ct. at 1269. Other aspects of the dealings between the parties, such as discounts, quantity sales, and a prolonged relationship, can also aid in proving that "[t]here is more than suspicion, more than knowledge . . ., [that t]here is informed and interested cooperation." *Id.* at 713, 63 S.Ct. at 1270.

A single conspiracy, rather than multiple conspiracies, may be found where the co-conspirators had a " 'common purpose.' " *United States v. Heinemann*, 801 F.2d 86, 91–92 (2d Cir.1986) (quoting *Kotteakos v. United States*, 328 U.S. 750, 769, 66 S.Ct. 1239, 1250, 90 L.Ed. 1557 (1946)), *cert. denied*, 479 U.S. 1094, 107 S.Ct. 1308, 94 L.Ed.2d 163 (1987). Nonetheless, the participants' goals need not be congruent for a single conspiracy to exist, so long as their goals are not at " 'cross purposes.' " *Unit-*

ed States v. Heinemann, 801 F.2d at 92 & n. 1 (*quoting United States v. Camiel*, 519 F.Supp. 1238, 1244 (E.D.Pa.1981), *aff'd*, 689 F.2d 31 (3d Cir.1982)); *see also United States v. Bagaric*, 706 F.2d 42, 63 (2d Cir. 1983) (coconspirators need not agree on details of conspiracy, where essential nature of plan is agreed on), *cert. denied*, 464 U.S. 840, 104 S.Ct. 134, 78 L.Ed.2d 128 (1983).

The matter of whether the evidence has established one conspiracy or more than one is a question of fact for a properly instructed jury. *E.g., United States v. Alessi*, 638 F.2d at 472. In assessing the contention that the evidence was insufficient to support the jury's conclusion that there was a single conspiracy, we must view the evidence as a whole in the light most favorable to the government, *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir.1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970),

and uphold the verdict if, viewed in that light, a rational juror could have concluded beyond a reasonable doubt (1) that the scope of the criminal enterprise proven fits the pattern of the single conspiracy alleged in the indictment, and (2) that the defendant participated in the alleged enterprise with a consciousness of its general nature and extent. In reviewing a verdict of guilty, "we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *United States v. LeRoy*, 687 F.2d 610, 616 (2d Cir.1982), *cert. denied*, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983); *see United States v. Tropiano*, 418 F.2d 1069, 1074–75 (2d Cir.1969), *cert. denied*, 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.2d 530 (1970). In the present case, we find no error in the instructions on conspiracy nor any insufficiency in the evidence.

The jury was properly instructed that it must find a single conspiracy among Lavery and the suppliers in order to convict Lavery; it was instructed as to certain characteristics of multiple conspiracies,

such as incompatible purposes; and it was told that it must acquit if it found the latter rather than the single conspiracy alleged in the indictment. Though Lavery asked the court to instruct the jury also that he could not be found guilty of conspiring with the suppliers if the jury found that the suppliers sought to defraud Beech-Nut, the court's refusal to give that charge was not error, for the requested instruction does not accurately reflect the law. "That certain defendants were eager to cheat each other for a large slice of the spoils does not obscure the unifying means used by all of them to defraud the public...." *United States v. Finkelstein*, 526 F.2d 517, 522 (2d Cir.1975), *cert. denied*, 425 U.S. 960, 96 S.Ct. 1742, 48 L.Ed.2d 205 (1976).

The evidence was ample to permit the jury to infer that Lavery conspired with the suppliers to perpetrate a fraud on the public through the distribution of the adulterated juice. The record included proof of Lavery's nonpursuit of any examination of Universal's blending facility; his refusal to heed the warnings of Beech-Nut's own

staff (*e.g.*, indicating that the Universal concentrate was largely sugar syrup) and the warnings of independent scientists (*e.g.*, stating that the apple juice concentrate contained no discernible apple juice); his directions to his scientific staff to make analysis of the concentrate a low priority item; and his directions to his purchasing manager to ignore the warnings of the scientists.

Further, it was plain that Lavery knew the Company was paying substantially less for the concentrate it bought from these suppliers than it had for the concentrate previously obtained from reputable suppliers; during the period 1979–1982, Lavery repeatedly told LiCari and others that the price Universal was charging Beech-Nut was 50 cents to a dollar per gallon below the price charged by Beech-Nut's former supplier. This was the very reason Lavery gave his subordinates for not wanting to change suppliers. Lavery conceded to the Processed Apple Institute detective in June 1982 that the fact that Universal's price was "very substantially below the market"

could have caused one to be "suspicious" of the quality of the concentrate. In addition, there was evidence that Lavery lied to state officials during their investigation, seeking to conceal his knowledge of this ground for suspicion. Thus, in 1983, when he was called to appear before the New York State Department of Agriculture and Markets, Lavery testified, notwithstanding his past repeated fiscal remonstrations to his subordinates, that he was unaware that the price Beech-Nut had been paying was below market.

In sum, the evidence was ample to permit the properly instructed jury to infer that Lavery and the concentrate suppliers were participants in a single scheme of passing off bogus substances as 100% pure fruit juice.

C. *The Advice-of-Counsel Defense*

In support of the defense that their conduct was not criminal because they acted upon the advice of counsel, defendants proffered, *inter alia*, testimony by Hoyvald, Beech-Nut's attorney Klein, and

Richard Morey, an attorney whose firm was retained by Klein's firm for its expertise in food-and-drug matters. Though much of the evidence proffered in support of this defense was admitted, the court refused to permit Klein and Morey to testify to the substance of the conversations between themselves to which Hoyvold was not a party, including Klein's statements to Morey as to advice sought by Hoyvald and Morey's statements to Klein as to what acts were permissible; and it excluded the attorneys' notes and time records. Hoyvald urged the admission of the two excluded categories of proof as (a) the best evidence of what had occurred at the time the advice was being given, (b) evidence of the information then available to the attorneys, (c) corroboration for Klein's testimony regarding the advice he gave Hoyvald, (d) proof of prior consistent statements made by Klein, to show that Klein's testimony was not recently fabricated, and (e) proof of the states of mind of Morey and Klein.

The trial judge viewed the proffered conversations between the lawyers as hearsay

and as irrelevant because they would show "the state of mind of the lawyers" rather than the state of mind or Hoyvald. He concluded that even if they were relevant, they presented the danger of confusing the jury as to whose state of mind was in issue. He excluded the attorneys' time records and notes on the ground that, given the attorneys' testimony, the documents would be cumulative. Though we might disagree with the court's characterization of some of this evidence as hearsay, we see no reversible error.

Rule 403 of the Federal Rules of Evidence gives the trial court broad discretion to exclude even relevant evidence if its probative value is substantially outweighed by the danger of confusion of the issues or if it would be needlessly cumulative. Fed. R.Evid. 403; *United States v. Carter*, 801 F.2d 78, 83 (2d Cir.), *cert. denied*, 479 U.S. 1012, 107 S.Ct. 657, 93 L.Ed.2d 712 (1986); *see United States v. Martinez*, 775 F.2d 31, 37 (2d Cir.1985). In light of the testimony that was admitted, we find no abuse of

discretion in the exclusion of the remaining evidence as irrelevant, confusing, and cumulative.

The evidence that was admitted encompassed all elements of the advice-of-counsel defense. Thus, Hoyvald described the information he had given the attorneys and all of the advice he had received from all of the attorneys. The latter included the advice from Klein on September 1, 1982, that the juice in the Secaucus warehouse could lawfully be shipped to Puerto Rico, and the advice on September 15, 1982, that Hoyvald could ship the juice then in the San Jose plant. Klein too was permitted to describe all of the advice he gave to Hoyvald. Klein also testified that he repeatedly consulted Morey and other attorneys. The court allowed both Klein and Morey to testify to the fact that they had repeatedly conversed and that advice given by Klein to Hoyvald followed conversations of Klein with Morey. Hoyvald was permitted to testify that Morey was the source of the advice he was given by Klein on September 1 and 15.

In addition, the court permitted Klein, during his testimony, to use his original notes and time records to refresh his recollection. Further, though it did not admit the physical records into evidence, it allowed extensive testimony concerning the time sheets later identified by the defense as the most important, and allowed them to be read verbatim to the jury.

In light of the record as a whole, we find no abuse of discretion in the trial court's decision to exclude the substance of the Klein–Morey conversations and the attorneys' documents on the ground that their relevance, if any, was outweighed by their propensity for confusion and their cumulative nature.

D. *The Conscious-Avoidance Instruction*

The trial court instructed the jury that it could find that the government had proven Hoyvald and Lavery had knowledge that the Company's apple juice was adulterated if it found they had deliberately avoided gaining actual knowledge of that fact. De-

fendants contend that this conscious-avoidance charge was erroneous because (1) it unfairly undercut their advice-of-counsel defense, and (2) it permitted the jury to convict them without finding that they had the requisite intent to commit the offenses. We reject both contentions.

1. The Effect on the Advice-of-Counsel Defense

Defendants' claim that any conscious-avoidance charge was impermissible because it was inconsistent with a defense of reliance on the advice of counsel is untenable. As described in greater detail below, the Supreme Court has emphasized that an advice-of-counsel defense presupposes the defendant's solicitation of advice in good faith. *Williamson v. United States*, 207 U.S. 425, 453, 28 S.Ct. 163, 173, 52 L.Ed. 278 (1908). This Court has repeatedly approved use of a conscious-avoidance charge in a variety of cases in which there was a genuine issue as to the defendant's good-faith ignorance of the illegality of his conduct. *See, e.g., United States v.*

Schiff, 801 F.2d 108, 112–13 (2d Cir.1986) (knowledge of tax laws), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1603, 94 L.Ed.2d 789 (1987); *United States v. Heinemann*, 801 F.2d at 93–94 (knowledge of lawfulness of tax avoidance scheme). There is no logical reason that this instruction may not also be used in the presence of an advice-of-counsel defense, the thrust of which is that the defendant, on the basis of counsel's advice, believed his conduct to be lawful and thus could not be found to have had unlawful intent. Though a defendant who would rely on an advice-of-counsel defense is required to have disclosed all pertinent information in his possession to his attorney, *see, e.g., Williamson v. United States*, 207 U.S. at 453, 28 S.Ct. at 173; *United States v. King*, 560 F.2d 122, 132 (2d Cir.), *cert. denied*, 434 U.S. 925, 98 S.Ct. 404, 54 L.Ed. 2d 283 (1977), there is no inherent inconsistency between his taking that action and his studious avoidance of gaining other pertinent information. Accordingly, we see no doctrinal problem with the court's giving a conscious-avoidance instruction in this case.

Accord United States v. Duncan, 850 F.2d 1104, 1118 (6th Cir.1988) (where defendant asserts good-faith reliance on advice from tax accountant, it is appropriate to "combin[e] the reliance instruction with an instruction on the adverse effect 'willful blindness' must have on a good faith defense to criminal intent").

Nor did the instruction as given in the present case unfairly impinge on the advice-of-counsel defense. In *Williamson*, the Supreme Court approved the following advice-of-counsel instruction as the most favorable to the defendant that may be given "consistently with right," 207 U.S. at 453, 28 S.Ct. at 173:

> [I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do ..., and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime [*sic*] which involves willful and unlawful intent[,] even if such

advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

Id.

The instruction of the district court in the present case followed this charge nearly *in haec verba.* Thus, the court stated that the jury must decide

> whether the defendant you are considering honestly and in good faith sought the advice of a lawyer as to what he could lawfully do in the future; whether he fully and honestly laid all material facts of which he has knowledge before the lawyer; and whether, in good faith, he honestly followed such advice, relying upon it and believing it to be correct.
>
> . . . It is the law that a defendant cannot be convicted of a crime that involves willful and unlawful intent, even if such advice were an inaccurate construction of the law, if the defendant relies in good faith on that advice.

> On the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences of his conduct by pleading that he followed the advice of his lawyer.

Accordingly, we reject the contention that the conscious-avoidance charge could not be given on account of the advice-of-counsel defense.

2. The Element of Intent

In order to convict a defendant of conspiracy or mail fraud, the government must prove that he had the specific intent to commit the crime charged. *See Direct Sales Co. v. United States*, 319 U.S. at 711, 63 S.Ct. at 1269 (conspiracy); *United States v. Lanza*, 790 F.2d 1015, 1024 (2d Cir.) (conspiracy), *cert. denied*, 479 U.S. 861, 107 S.Ct. 211, 93 L.Ed.2d 141 (1986); *United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.) (mail fraud), *cert. denied*, 464 U.S. 853, 104 S.Ct. 167, 78 L.Ed.2d 152 (1983); *United States v. Von Barta*, 635 F.2d 999, 1005 n. 14 (2d Cir.1980) (mail fraud), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68

L.Ed.2d 199 (1981). Similarly, a defendant is guilty of felony violation of § 331(a) if he has acted with "intent to defraud or mislead." 21 U.S.C. § 333(b). Hoyvald and Lavery contend that the conscious-avoidance charge as delivered by the trial court was erroneous because it allowed the jury to convict them without finding the requisite intent. Although the charge could have been clearer in this respect, we find no reversible error.

Conscious avoidance is a concept that deals most directly with knowledge. A conscious-avoidance instruction is appropriate when a defendant claims to lack "some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance." *United States v. Lanza*, 790 F.2d at 1022. Nonetheless, conscious avoidance is not irrelevant to intent, for knowledge is one component of intent. "Without the knowledge, the intent cannot exist." *Direct Sales Co. v. United States*, 319 U.S. at 711, 63 S.Ct. at 1269. Thus, even in a conspiracy case, in which specific intent must be

proven, use of a conscious-avoidance instruction may be appropriate with respect to the defendant's knowledge of the objectives of the conspiracy, *see, e.g., United States v. Gurary*, 860 F.2d 521, 527 & n. 6 (2d Cir.1988); *United States v. Lanza*, 790 F.2d at 1022–23. The same is true of mail fraud cases. *See, e.g., United States v. Shareef*, 714 F.2d 232, 233 (2d Cir.1983); *see also United States v. Brien*, 617 F.2d 299, 312 (1st Cir.), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980).

In contending that the trial court's conscious-avoidance charge prejudiced them with respect to the element of intent, defendants focus on two sentences in the instructions:

> [1] Thus, even if you find that the defendant you are considering did have actual knowledge that the apple juice concentrate and apple juice were adulterated, you may still find that the knowledge, and intent and willfull requirements are satisfied if you find that the defendant you are considering consciously avoided knowledge of the au-

> thenticity of the apple juice or concentrate,

and

> [2] In determining whether the defendant you are considering acted knowingly, willfully and intentionally, you may consider whether he deliberately closed his eyes to what otherwise would have been obvious to him....

It would indeed be preferable for trial courts to refrain from describing conscious avoidance in a way that suggests that it is equally probative of knowledge and intent, for though it is relevant to both it is sufficient only as to knowledge. From the quoted statements it would arguably be possible for a jury, if it focused on them in isolation, to draw the unwarranted inference that it was permitted to find the requisite intent solely from the fact of conscious avoidance of knowledge. Thus, we would urge the trial court in each case to clarify for the jury to the greatest extent possible that the conscious-avoidance concept is pertinent to knowledge or sincerity of belief, or to the knowledge component of intent,

but that a finding of conscious avoidance could not alone provide the basis for finding purpose or for finding intent as a whole.

Nonetheless, in assessing the likely effect of the quoted statements on the jury in the present case, we must view them in light of the jury charge as a whole, *Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 400–01, 38 L.Ed.2d 368 (1973), and we conclude that the charge as a whole properly instructed the jury that conscious avoidance could satisfy only the knowledge element of the offense or the knowledge component of the intent element. For example, with respect to the conspiracy count, the district court stated that a defendant must be found to have "willfully entered" the unlawful agreement, that he "knowingly and willfully became a member," and that he "willfully participated in the unlawful plan with the intent to advance or further" the conspiracy. The court defined "willfully" as acting "voluntarily or intentionally and with a specific intent to do something the law forbids." The court stated that for

proof of membership in a conspiracy, specific intent must be proven, and it made it clear that intent comprises both knowledge and purpose, defining specific intent as "knowingly d[oing] an act which the law forbids, purposely intending to violate the law." It then stated that two varieties of knowledge are involved in a conspiracy charge, the first of which—knowing participation—requires specific intent, but the second of which—knowledge of the unlawful objectives—may be satisfied by conscious avoidance. Similar explanations and definitions were given for the mail fraud and FDCA charges.

In sum, viewing the charge given here in its entirety, we conclude that the requisite mental state for each element of each crime alleged was correctly described, separately and repeatedly, to the jury, and that the challenged statements did not constitute reversible error.

E. *Miscellaneous Contentions*

Defendants make a variety of other arguments that we have also found to be without merit. They include claims that the failure to start trial before November 1987 violated the Speedy Trial Act and that the court erred in admitting certain evidence as coconspirator statements.

1. The Speedy Trial Claim

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (the "Act"), provides that except for days that are "excludable" from the computation required by the Act, a defendant shall be brought to trial within 70 days after indictment or arraignment, whichever occurs later. *Id.* §§ 3161(c)(1) and (h). Hoyvald and Lavery contend that the delay between their arraignment in November 1986 and the beginning of trial in November 1987 encompassed 186 nonexcludable days, and thus the indictment against them should be dismissed. For the reasons stated by the district court, *see* 677

F.Supp. 117 (1987), this argument is meritless.

The Speedy Trial Act provides, *inter alia*, that the district court may grant a continuance on the request of either side or on its own motion, and that the resulting delay may be excluded from the 70–day computation if the court (1) finds "that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial," and (2) sets forth its reasons for that finding on the record. *Id.* § 3161(h)(8)(A); *see also United States v. Tunnessen*, 763 F.2d 74, 76–78 (2d Cir. 1985) (finding must be made before excludable period begins). Among the factors the court may consider in making such a finding is that

> the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the

> trial itself within the time limits established by this section.

Id. § 3161(h)(8)(B)(ii). While these provisions accord the district court considerable discretion to grant a continuance when it is "necessary to allow further preparation" for trial, *United States v. Rojas-Contreras*, 474 U.S. 231, 236, 106 S.Ct. 555, 558, 88 L.Ed.2d 537 (1985), they do not permit unlimited delays, and the trial court has the responsibility to ensure that the length of an excludable continuance is reasonably related to the needs of the case, *see United States v. LoFranco*, 818 F.2d 276, 277 (2d Cir.1987) (dictum). All of these standards appear to have been met in the present case.

At the arraignments in November 1986, the government informed the court that the case was complex, noting, *inter alia*, that there were eight defendants and 470 counts, requiring proof of more than 2,500 separate offenses at trial. It pointed out that its proof would include extensive scientific evidence and thousands of documents designed to show that the juice and

concentrate were adulterated and were shipped in interstate commerce. The government also stated that counsel for Hoyvald had indicated that he anticipated extensive defense motions, and the court noted that a number of the defendants had requested additional time to make their motions. In response to an inquiry from the court, Hoyvald's attorney stated, "Your Honor, we agree with the Government's representation that it is a complex case and would waive a Speedy Trial Act...." Lavery's counsel joined this representation. The court thereupon accepted the parties' representations and declared the case a "complex case" within the meaning of the Act and stated that it would postpone setting a trial date until pretrial proceedings were well underway.

Thereafter, defendants made more than a dozen motions, the last of which were submitted on March 31, 1987. Among these were motions by Hoyvald for additional time to file other pretrial motions, including motions to take depositions and to issue letters rogatory. In connection

with the latter motions, Hoyvald's counsel represented, *inter alia*, that pretrial discovery was needed of present and former employees of Beech–Nut's parent company, headquartered in Switzerland, and that counsel was unable at that time to identify with certainty the persons living outside the United States who might be called as witnesses for Hoyvald at trial. Counsel expected to conduct interviews and to make determinations as to what depositions and letters rogatory would be needed "over the next several months." The last of the motions filed on or before March 31 were decided on May 11, 1987.

During this motion period, the government made available to defendants some 30,000 documents in response to their requests for discovery. It subsequently served trial subpoenas *duces tecum* on Beech–Nut, demanding the production of a number of corporate records. Beech–Nut's initial response was a wholesale refusal to produce on the ground of attorney-client-privilege, though it did not file a motion to quash. During this period, Hoyvald nei-

ther made any requests for depositions or letters rogatory nor informed the court that he had decided not to make such requests. Nor did any defendant advise the court that he, she, or it was ready for trial.

Giving "substantial advance notice," 677 F.Supp. at 122, the court scheduled a pretrial conference for October 14, 1987. At that conference, for the first time, Hoyvald moved orally for dismissal of the indictment on the ground that the Speedy Trial Act provisions had been violated, apparently attempting to repudiate his earlier agreement that the case was complex. Counsel invoked a statement by the court, made in the process of denying certain of defendants' earlier motions, that the defendants were attempting to complicate unnecessarily an otherwise straightforward case. *See* 659 F.Supp. at 1490. The court denied Hoyvald's speedy trial motion in an opinion reported at 677 F.Supp. 117, familiarity with which is assumed. We affirm substantially for the reasons stated in the district court's opinion.

The defendants had agreed at the outset that the case was complex; they had not advised the court of any change in that view prior to the October 1987 conference. With or without their agreement, the court's conclusion in all the circumstances that the case was complex within the meaning of the Speedy Trial Act was not an abuse of discretion. Further, several matters remained open. Hoyvald had represented to the court in March 1987 that he needed several months just to determine what depositions and letters rogatory he would need; he had not advised the court of any change in his discovery plans. Beech-Nut had refused to produce documents pursuant to the government's trial subpoena, and its compliance remained unresolved at the time the court, on its own motion, scheduled the October 1987 conference.

In sum, the pretrial delay here seems to have been reasonably related to the actual needs of the case. Though it would perhaps generally be preferable for the court initially to set a tentative trial date, it is not

an abuse of discretion in a case such as this to postpone the setting of a date until the extent of the needed pretrial proceedings becomes clearer, so long as there is no intent or appearance that unlimited or undue delay will be permitted. There is no hint whatever in the present record that the court was willing to tolerate indefinite delay. It had indicated that it would set a trial date when defendants' pretrial discovery needs came into clearer focus, and it scheduled the October 1987 conference on its own motion. In all the circumstances, we find no abuse of discretion and no violation of the Act.

2. Admissibility of the Coconspirator Statements

At trial, LiCari testified, over defendants' objection, to conversations he had in 1983 with two Beech–Nut employees on the subject of Beech–Nut's sale of adulterated juice. LiCari, who had left Beech–Nut's employ in January 1982, testified that he had met Beech–Nut's purchasing manager Jones at an industry association meeting in

January or February of 1983, and that Jones "said that Mr. Lavery had indicated that they got away with it, that the matter was dead." LiCari testified that William Knutsen, manager of quality control in Beech–Nut's Canajoharie plant, made a similar statement to him. The trial court overruled defendants' hearsay objection to this testimony on the ground that Lavery's statements to Jones and Knutsen were admissions of a party and thus not hearsay, *see* Fed.R.Evid. 801(d)(2)(A), and that the statements of Jones and Knutsen to LiCari were coconspirator statements in furtherance of the conspiracy, and thus not hearsay, *see* Fed.R.Evid. 801(d)(2)(E). Lavery contends that he is entitled to a new trial because "under no view of the facts could these merely narrative statements, made to a person outside the alleged conspiracy, have been uttered in furtherance of any conspiracy." We disagree.

Whether a proffered statement is made "in furtherance" of a conspiracy is a preliminary question of fact to be determined by the trial court by a preponderance of the

evidence. *See United States v. DeJesus*, 806 F.2d 31, 34 (2d Cir.1986). The court's finding that a statement was made in furtherance of a conspiracy is not subject to reversal unless it is clearly erroneous. *See United States v. Rahme*, 813 F.2d 31, 36 (2d Cir.1987). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

The principal question in the "in furtherance" issue is whether the statement promoted, or was intended to promote, the goals of the conspiracy. "[I]dle chatter" does not meet the test, *e.g.*, *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980); nor does a " 'merely narrative' " description by one coconspirator or the acts of another, *United States v. Heinemann*, 801 F.2d at 95 (quoting *United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir.1964)). Coconspirator statements may be found to be "in furtherance" of the conspiracy within the meaning of Rule 801(d)(2)(E) if they

"prompt the listener to respond in a way that facilitates the carrying out of criminal activity." *United States v. Rahme*, 813 F.2d at 35. Though the Rule requires that both the declarant and the party against whom the statement is offered be members of the conspiracy, *see, e.g., United States v. Lieberman*, 637 F.2d at 102, there is no requirement that the person to whom the statement is made also be a member.

In the present case, the trial court found that the statements of Jones and Knutsen were in furtherance of the conspiracy because they were designed to "cover up" the matter of Beech-Nut's distribution of adulterated juice. This finding was not clearly erroneous. Although Li-Cari was not alleged to have been a member of the conspiracy, he was obviously intimately aware of the events from 1978 to 1982 and of Lavery's response, or lack of response, to the reports that the concentrate purchased from Universal was adulterated. He was thus somewhat at risk of being accused of complicity in those events.

He also had repeatedly urged Lavery and Jones to terminate the purchases from Universal, and he may well have been perceived by Lavery and other Beech–Nut officials as a risk to them. In the circumstances, it was permissible for the court to infer that members of the conspiracy told LiCari that Lavery believed the matter was finished in an effort to reassure LiCari and encourage him to not to reveal incriminating information. Thus, the finding that the statements were in furtherance of the conspiracy was not clearly erroneous.

CONCLUSION

We affirm Lavery's conviction on the conspiracy and mail fraud counts. We reverse Hoyvald's and Lavery's convictions on the substantive FDCA counts for lack of venue in the Eastern District of New York and remand to the district court for dismissal of those counts of the indictment.

CARDAMONE, Circuit Judge, dissenting in part:

Although I agree that the conspiracy and mail fraud convictions should be affirmed, I respectfully dissent from that portion of the majority opinion reversing the substantive FDCA convictions on the grounds of improper venue. I would hold, as did the district court, that violations of 21 U.S.C. § 331(a) are "continuing offenses," to which the venue provisions of 18 U.S.C. § 3237(a) apply. Because a continuing offense under § 3237(a) is triable "in any district in which such offense was begun," venue was properly laid in the Eastern District of New York where appellants Hoyvald and Lavery began purchasing adulterated and misbranded juice concentrate. In my view therefore appellants' convictions on the FDCA offenses should be affirmed.

For purposes of its venue analysis, the majority agrees that violations of § 331(a) are continuing offenses subject to the venue provisions of § 3237. It notes that venue is properly laid "in a district from which

defendant caused the unlawful introduction of goods into commerce, even though physical shipment, commenced from a different district." *See United States v. Taller*, 394 F.2d 435, 437–38 (2d Cir.), *cert. denied*, 393 U.S.. 839, 89 S.Ct. 115, 21 L.Ed.2d 109 (1968)). In construing a continuing offense, the Supreme Court counsels that "'the locality of [the] crime shall extend over the whole area through which force propelled by an offender operates.'" *United States v. Cores*, 356 U.S. 405, 408, 78 S.Ct. 875, 878, 2 L.Ed.2d 873 (1958) (quoting *United States v. Johnson*, 323 U.S. 273, 275, 65 S.Ct. 249, 250, 89 L.Ed. 236 (1944)).

Here, Lavery had reason to question the authenticity of the concentrate Beech–Nut was purchasing as early as October 1978 when he received Dr. LiCari's initial memorandum. Nevertheless, he continued to authorize purchases of such concentrate from Universal's Long Island warehouse, and did so despite reports that the Universal facilities did not include blending equipment needed to manufacture the pure apple

concentrate that Beech-Nut was allegedly buying. Even after having received several adverse reports concerning the quality of Beech-Nut juices in early 1981—including the unsolicited report of the Swiss laboratory—Hoyvald and Lavery continued buying the ersatz concentrate from their bargain-basement suppliers in the Eastern District. Upon receipt of the concentrate at its upstate plant, Beech-Nut merely added water and Vitamin C and marketed a product it labeled as containing "100% Fruit Juice, Apple Juice from Concentrates and Vitamin C." Thus, appellants' FDCA offenses began with the purchase of concentrate from the district in which those offenses were tried. It seems plain that "forces propelled by the defendants" in the commission of the crimes that are the subject of this appeal did "operate" in the Eastern District of New York.

The analytical framework that is set forth in *United States v. Reed*, 773 F.2d 477 (2d Cir.1985), supports the conclusion that the Eastern District was the appropriate venue for appellants' trial. In *Reed*,

we noted that the Constitution requires "that the venue chosen be determined from the nature of the crime charged as well as from the location of the act or acts constituting it, and that it not be contrary to an explicit policy underlying venue law." *Id.* at 480. Because the Supreme Court has not enumerated the precise policies underlying venue law, we concluded that "fairness to defendants [could not] be the sole grounds for determining venue" and held that the test considers "a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding...." *Id.* at 481.

The majority first considers the situs of the defendants' criminal acts and concludes that appellants conducted no business from the Eastern District of New York. Concededly, Hoyvald and Lavery did not personally go into the Eastern District to buy the concentrate. But I do not read § 3237 as requiring the physical presence of defendants in the district where the continuing

offense was begun. Nothing in the statute or the Constitution mandates that, for venue to be in the Eastern District, the introduction of adulterated juice into interstate commerce must have been caused by these appellants from the Eastern District. It is sufficient that every shipment of juice recited in counts 22 through 450 of the indictment resulted from the appellants' knowing purchase of simulated apple juice concentrate that was warehoused in the Eastern District. At the direction of Lavery, and later Hoyvald, Beech–Nut employees regularly placed calls to their suppliers in the Eastern District and routinely followed-up by mailing written confirmation orders into that district. The focus of the effect of this continuing crime was nationwide, and suitability for factfinding was equally as good in the Eastern District as in the Northern District of New York.

Further, prior precedents support venue in the Eastern district. In *United States v. Cattle King Packing Co.*, 793 F.2d 232 (10th Cir.), *cert. denied*, 479 U.S. 985, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986), Colorado

venue was held appropriate for the trial of various Federal Meat Inspection Act violations, 21 U.S.C. § 601–624 (1982), despite the fact that the record was devoid of any evidence (1) that the adulterated meat—shipped from Nebraska to California—had ever passed through the forum district, and (2) that the defendant who contested the Colorado venue had ever set foot in the district where the offenses were tried. Venue in Colorado was upheld based upon evidence that one of the defendant's subordinates had made a number of telephone calls from Colorado at the direction of his superior in his efforts to sell the adulterated meat to a California wholesaler. *Id.* at 239 n. 4.

Cattle King illustrates the modern trend of moving from formalism toward a flexible interpretation of continuing offenses under § 3237. Thus, for example, in *U.S. v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir.1987), we upheld venue under § 3237(a) in the Southern District of New York with respect to charges of importation of cocaine where (1) the "importation" had oc-

curred in Florida, and where (2) the only connection between the importation and the forum district was the fact that an FBI-owned plane which transported the substances from Florida to LaGuardia Airport in the Eastern District of New York flew over a body of water in the joint jurisdiction of the Eastern and Southern Districts.

Perhaps most significant is *United States v. Busic*, 549 F.2d 252 (2d Cir.1977). There a passenger plane was hijacked in airspace outside the district where the crime was charged. The crime of aircraft piracy, 49 U.S.C.App. § 1472 (1982), has its own venue provision that employs language virtually identical to that in § 3237: It provides that the offense may be tried in any district in which the offense was "begun, continued, or completed." *Id.* § 1473(a). Defendants had conspired and prepared to commit the offense in the Eastern District of New York by assembling the constituent parts for their imitation bombs and by boarding the plane at LaGuardia Airport. Yet the district court held that venue on the substantive hi-

ghjacking counts (as opposed to the conspiracy counts) was not proper in the Eastern District because the highjackers had not exercised actual control over the aircraft until well after it had left the district. The district judge reasoned, as does the majority in this case, that the offense of air piracy had not yet begun while the defendants were in the Eastern District because the acts which defendants had carried out in that district were merely preparatory to the substantive crimes.

In reversing, we rejected such a "tortured and hyperconstricted reading" of the term "begun," and held that the crime of air piracy began in the Eastern District, even though the actual highjack note was not passed to the crew of the aircraft until well after the plane had left the district. *Id.* at 256. We expressly declined to adopt defendants' contention that the venue statute is "susceptible to one narrow constitutional reading, which would advance the moment of beginning so near the point of consummation of the crime that the words might as well be read as synonymous and

without any significant statutory difference." *Id.* In enacting § 3237 Congress did not design a theoretical statute that would operate in "an abstract world of Platonic forms, but to the real world of action." *Id.* at 258.

In the instant case, the crime of introducing adulterated and misbranded juice into interstate commerce began with the knowing purchase of adulterated concentrate from suppliers in the Eastern District of New York. Such purchases were no more preparatory acts than were the manufacture of the imitation dynamite and the boarding of the plane in *Busic*. The act of purchasing the adulterated concentrate was the point at which the offense was begun. The purchase was not preparation for, but initiation of the substantive FDCA offenses for which appellants were convicted.

Finally, the majority cites *United States v. Bozza*, 365 F.2d 206, 220–21 (2d Cir. 1966), as standing for the proposition that the making of a contract to receive stolen

goods is not the beginning of a receiving, and that appellants' purchase of concentrate cannot therefore constitute the beginning of the conduct proscribed by § 331(a). But *Bozza* is inapposite to the present case because there the crimes were noncontinuing, and the venue provisions of § 3237 were held inapplicable. Because the crimes in *Bozza* were single-act offenses, we could not use the liberalized venue provision applicable in the instant case. The remaining cases cited by the majority are also inapposite because most do not involve continuing offenses. *See, e.g., United States v. Davis*, 666 F.2d 195, 200 (5th Cir. Unit B 1982) (venue provisions of § 3237 not mentioned); *United States v. Chestnut*, 533 F.2d 40, 47 (2d Cir.1976) (trial of a non-continuing, single-act offense).

Accordingly, I dissent from that portion of the majority opinion that reverses the FDCA convictions on the grounds of improper venue and vote to affirm those convictions.

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of June one thousand nine hundred and eighty-nine

UNITED STATES OF AMERICA,

Appellee,

-v-

NEILS L. HOYVALD and JOHN F. LAVERY,

Appellants

UNITED STATES COURT OF APPEALS
FILED
JUN 08 1989
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

DOCKET NUMBER
88-1287, 88-1288

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, John F. Lavery

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for hearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

OPINION OF THE DISTRICT COURT

UNITED STATES of America

v.

BEECH-NUT NUTRITION CORPORATION, Niels L. Hoyvald, John F. Lavery, Zeev Kaplansky, Raymond H. Wells, Nina B. Williamson, South Orange Express, Inc., Danny A. Shaeffer, Defendants.

No. 86 CR 715.

United States District Court,
E.D. New York.

May 11, 1987.

Andrew J. Maloney, U.S. Atty., E.D.N.Y. by Thomas H. Roche, Asst. U.S. Atty., Brooklyn, N.Y., and Office of Consumer Litigation, U.S. Dept. of Justice, Washington, D.C. by John R. Fleder, Director, Kenneth L. Jost, Sharon I. Kurn, for U.S. (Ste-

phen D. Terman, Office of the Chief Counsel, Food and Drug Admin., Rockville, Md., of counsel).

Schulte Roth & Zabel, by John S. Martin, Jr., Stacey J. Moritz, Philip G. Barber, New York City, for defendant Beech-Nut.

Kostelanetz & Ritholz by Lawrence S. Feld, New York City, and Williams & Connolly, by Richard M. Cooper, Brendan V. Sullivan, Jr., Barry S. Simon, Jeanne M. Rowzee, Washington, D.C., for defendant Hoyvald.

Steven Kimelman, New York City, for defendant Lavery.

Obermaier, Morvillo & Abramowitz by Elkan Abramowitz, New York City, for defendant Kaplansky.

Emanuel R. Gold & Associates by Emanuel R. Gold, New York City, for defendant Wells.

Thomas J. Concannon, The Legal Aid Society, Brooklyn, N.Y., for defendant Williamson.

Gotlin, Jaffe & LaBush by Gerald LaBush, New York City, for defendant South Orange Exp.

Ira London, Vivian Shevitz, Brooklyn, N.Y. and Irwin H. Schwartz, Seattle, Wash., for defendant Shaeffer.

MEMORANDUM AND ORDER

PLATT, District Judge.

In this straightforward criminal case charging defendants with misbranding and adulterating apple juice products, defense counsel, in a brilliant display of imaginative creativity, have attempted in a series of pre-trial motions to convert rather simple allegations contained in the indictment herein into a complex maze of confusing theories based in large part upon their own conceptions of viable defenses. In order to replace everything into proper perspective we must summarize the indictment and analyze their multiple motions separately.

The Indictment

On November 5, 1986, the Government filed a 470 count indictment against the

following eight defendants: the Beech-Nut Corporation, Niels L. Hoyvald, John F. Lavery, Zeev Kaplansky, Raymond H. Wells, Nina B. Williamson, South Orange Express, Inc. ("SOX") and Danny A. Shaeffer. During the time relevant to the indictment, Hoyvald was the president of the Beech-Nut Corporation and Lavery its vice-president. Indictment, ¶¶ 3, 4. Kaplansky, Shaeffer and Wells conducted business under the name Nameco Trading Co. Wells also owned Food Complex Co., Inc. ("Food Complex"), which he operated with Williamson, an officer of the company. The Beech-Nut Corporation, Nameco Trading Co. and Food Complex manufactured, processed, labeled, held, shipped and sold foods in interstate commerce. SOX was a New Jersey corporation engaged in the business of labeling, holding and shipping foods in interstate commerce. *Id.*, ¶ 8.

Count One alleges that all eight defendants, with intent to defraud, conspired to introduce or deliver for introduction or cause the delivery or introduction of adulterated and misbranded apple juice product

into interstate commerce, in violation of the Federal Food, Drug and Cosmetic Act ("FFDCA"), Title 21, United States Code, Sections 331(a), 331(k) and 333(b). The apple juice products were allegedly adulterated within the meaning of 21 U.S.C. §§ 342(b)(1) and 342(b)(2) and misbranded within the meaning of 21 U.S.C. §§ 343(a)(1), 343(b), 343(i)(2) and 343(k). As part of the conspiracy defendants Kaplansky, Wells, Williamson, SOX and Shaeffer ("Suppliers") allegedly sold adulterated and misbranded apple juice *concentrate* to defendants Beech-Nut Corporation, Hoyvald and Lavery ("Beech-Nut defendants"). In furtherance of the conspiracy the Beech-Nut defendants, with intent to defraud, introduced into interstate commerce or delivered for introduction adulterated and misbranded *apple juice* and *juices* containing in part apple juice. The products labeled apple juice and apple juice concentrate contained primarily beet sugar, malic acid, apple flavor, caramel color, corn syrup and very little, if any, apple juice or apple juice concentrate. Indictment, ¶¶ 14, 15.

Counts Two through Twenty-one charge all the defendants with engaging in a scheme to defraud in violation of the mail fraud statute, Title 18, United States Code, Section 1341. Indictment, ¶¶ 18, 26. As part of the scheme Beech-Nut defendants purchased apple juice concentrate from Kaplansky and Food Complex. *Id.*, ¶ 19. When the Beech-Nut Corporation wanted to buy foods labeled as *apple juice concentrate*, an employee of the Corporation would notify Kaplansky's broker. *Id.*, ¶ 24. Shaeffer and Kaplansky would arrange to have a mixture of beet sugar, malic acid and apple flavor prepared and delivered to SOX. *Id.*, ¶ 20. SOX would then stencil the words "apple concentrate" on the drums of flavored syrup. *Id.*, ¶ 21. When the Corporation wanted to purchase foods labeled as *pure apple juice concentrate*, it would notify Food Complex. Food Complex's owner and officer, defendant Wells, and defendant Wiliamson, a Food Complex officer, would then purchase beet sugar, malic acid, caramel color and apple flavor and mix the ingredients at the Food Complex plant and thereafter misrepresent the

product. *Id.*, ¶ 22. In furtherance of the scheme to defraud defendants allegedly used the United States mails on 20 separate occasions.

Counts Twenty-two through Four Hundred Fifty allege that Beech-Nut defendants, Wells and Kaplansky, with intent to defraud, introduced or delivered for introduction or caused the delivery or introduction of, within the Eastern District of New York and elsewhere, adulterated and misbranded apple juice and apple juice products into interstate commerce.

Finally, Counts Four Hundred Fifty-one through Four Hundred Seventy charge Supplier defendants with selling adulterated and misbranded foods labeled as apple juice concentrate to customers other than the Beech-Nut defendants.

Defendants have filed the following motions: (1) motions to dismiss Count One for alleging multiple conspiracies; (2) motions to dismiss Counts Two through Twenty-one on the grounds that they allege separate schemes to defraud; (3) motions to dismiss Counts Twenty-two through Four Hundred

Fifty for lack of venue; (4) motions to compel the Government to elect between multiplicitous counts; (5) motions to sever on the grounds of improper or prejudicial joinder; (6) motions to dismiss Counts Twenty-two through Four Hundred Fifty and Counts Four, Five, Seven, Eight, Nine and Fifteen as constitutionally vague and failing to state an offense; (7) a motion to dismiss the indictment on the basis of grand jury abuse; (8) discovery motions; and (9) motions for a bill of particulars.

I. *Conspiracy*

Defendants move to dismiss Count One on the grounds that it improperly alleges multiple conspiracies and fails to specify the object of the conspiracy.

First, defendants claim that Count One alleges two separate conspiracies: one conspiracy among Supplier defendants to introduce adulterated and misbranded apple juice *concentrate* into interstate commerce with intent to defraud and a second, subsequent, conspiracy among Beech-Nut defendants to ignore the adulterated na-

ture of the concentrate purchased from Suppliers and with intent to defraud introduce into interstate commerce adulterated and misbranded *apple juice*. The Beech-Nut defendants see themselves as the unknowing victims of the fraud perpetuated by Suppliers. They argue that as a matter of logic victims and perpetrators cannot conspire. Therefore, since they could not conspire with Suppliers, Count One cannot allege a single conspiracy. Since Count One cannot allege a single conspiracy, they conclude that Count One must allege multiple conspiracies.

Defendants' second argument asserts that Count One should be dismissed for failure to specify the object of the conspiracy. According to Beech-Nut defendants, in a conspiracy to violate the FFDCA, defendants must agree to adulterate or misbrand a specific product. Therefore, Count One should specify whether defendants agreed to adulterate and misbrand either apple *juice* or apple juice *concentrate*.

An indictment must allege the essential elements of the offense charged. *See Wong Tai v. United States*, 273 U.S. 77, 80–81, 47 S.Ct. 300, 301–302, 71 L.Ed. 545 (1927). Thus, an indictment charging defendants with conspiracy must allege an agreement, *United States v. Alessi*, 638 F.2d 466, 473 (2d Cir.1980), and some object of the conspiracy, *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir.1977). An indictment alleges a single conspiracy if it charges defendants with agreeing to participate in one or more common criminal ventures. *See Alessi*, 638 F.2d at 473 (to prove a single conspiracy, the Government must show that the defendants knowingly participated in a common criminal venture). The conspiracy is the crime, however diverse its objects. *Braverman v. United States*, 317 U.S. 49, 54, 63 S.Ct. 99, 102, 87 L.Ed. 23 (1942); *United States v. Murray*, 618 F.2d 892, 896 (2d Cir.1980).

By charging defendants with agreeing to violate the FFDCA, 21 U.S.C. §§ 331(a), (k) & 333(b), Count One alleges a single conspiracy with multiple objects.[1] The acts

violating Title 21, United States Code, Sections 331(a),[2] (k),[3] and 333(b)[4] represent the objects of the alleged conspiracy. These objects include introducing or delivering for introduction or causing the introduction or delivery into interstate commerce, of adulterated or misbranded food, 21 U.S.C. § 331(a); altering in whole or in part the labeling of food while it is held for sale, after shipment in interstate commerce, 21 U.S.C. § 331(k); and doing anything to a food while it is held for sale after shipment in interstate commerce which would result in the food being adulterated or misbranded. 21 U.S.C. § 331(k). In each case defendants allegedly acted with intent to defraud or mislead in violation of section 333(b). 21 U.S.C. § 333(b).

Whether the evidence adduced at trial supports the single conspiracy alleged in Count One is a question which must be resolved at trial. *Alessi*, 638 F.2d at 462. Accordingly, defendants' motions must be denied.

II. *Separate Schemes to Defraud*

The Beech-Nut defendants, joined by Kaplansky and Williamson, move to dismiss the mail fraud counts (Counts Two through Twenty-one) on the grounds that they allege separate schemes to defraud. Beech-Nut defendants claim that Counts Two through Twenty-one allege two separate schemes to defraud: one scheme among Supplier defendants to defraud purchasers of apple juice *concentrate* and a separate scheme among Beech-Nut defendants to defraud buyers of apple *juice.* Beech-Nut defendants reiterate their "victim" theory. In an argument parallel to their dual conspiracy argument, Beech-Nut defendants assert that any alleged common scheme to defraud between themselves and Suppliers would result in a scheme to defraud themselves. Therefore, since the existence of a common scheme is logically impossible, Counts Two through Twenty-one must allege separate schemes to defraud.

Again, an indictment must allege the essential elements of the offense

charged. *See Wong Tai*, 273 U.S. at 80–81, 47 S.Ct. at 301–302. To sustain a mail fraud count, 18 U.S.C. § 1341, the Government must charge that the defendants participated in a single scheme to defraud and knowingly used the mails to further the scheme. *See United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.), *cert. denied*, 464 U.S. 853, 104 S.Ct. 167, 78 L.Ed.2d 152 (1983); 2 Devitt & Blackmar, *Federal Jury Practice & Instructions*, § 47.05 at 657 (3rd ed. Supp.1986).

Counts Two through Twenty-one allege that all eight defendants engaged in a joint venture to defraud purchasers of apple juice products.[5] All eight defendants intentionally devised a scheme "and artifice to defraud and to obtain money ... by false ... representation ... from buyers of foods labeled ... apple juice concentrate, apple juice and juices containing, in part, apple juice." Indictment, ¶ 18. In furtherance of the scheme, defendants knowingly, *Id.*, ¶ 26, used the United States Postal Service on 20 separate occasions to mail purchase orders, delivery orders and purchase order alterations. *Id.*, ¶¶ 18–26.

Hence this indictment properly alleges a single scheme to defraud where the different co-schemers played different roles. *See Mansfield v. United States*, 155 F.2d 952, 953 (5th Cir.), *cert. denied*, 329 U.S. 792, 67 S.Ct. 364, 91 L.Ed. 678 (1946).

The essential elements of mail fraud have been alleged. *Gelb*, 700 F.2d at 879. Therefore, as with defendants' motions to dismiss Count One, defendants' motions to dismiss Counts Two through Twenty-one must be denied.

III. *Venue*

The Beech-Nut defendants, joined by defendants Kaplansky and Wells, move to dismiss Counts Twenty-two through Four Hundred Fifty for lack of venue. Counts Twenty-two through Four Hundred Fifty charge that the Beech-Nut defendants and Kaplansky and Wells, with intent to defraud, introduced or delivered for introduction or caused the delivery or introduction, into interstate commerce of adulterated apple juice products (Counts Twenty-two through Two Hundred Sixty), misbranded apple juice (Counts Two Hundred Thirty-

seven through Four Hundred Four), and misbranded apple juice products (Counts Four Hundred Five through Four Hundred Fifty), in violation of Title 21, United States Code, Section 331(a). These defendants are also charged with aiding and abetting the FFDCA violations under Title 18, United States Code, Section 2.

Defendants' argument assumes the existence of separate conspiracies and separate schemes to defraud and focuses on the prohibited act of introduction. Beech-Nut defendants claim that in § 331(a) offenses, 21 U.S.C. § 331(a), venue is governed by Rule 18 of the Federal Rules of Criminal Procedure. Therefore, venue in this case lies either in the district where the adulterated product was introduced or delivered for introduction or in the district where the defendants acted to cause such introduction or delivery. The Beech-Nut defendants argue that they are charged only with introducing apple juice into interstate commerce, not apple juice concentrate. Therefore, venue as to them lies in the district where the apple juice, not the apple juice concentrate, was introduced into interstate

commerce. They claim they never shipped apple juice from this district.

Venue in criminal cases is governed by Rule 18 unless a statute otherwise provides for specific venue. Fed.R.Crim.P. 18. A section 331(a) offense, 21 U.S.C. § 331(a), is a continuous crime within the meaning of 18 U.S.C. § 3237(a). The continuous crime statute has its own venue provision and, therefore, Rule 18 does not apply to section 331(a) offenses.

Section 3237 defines continuous crimes as, *inter alia*, offenses involving transportation in interstate or foreign commerce. 18 U.S.C. § 3237. The operative word in section 3237 is "involving", the term to involve being defined as "to include as a necessary circumstance." The American College Dictionary 643 (1970). Any offense which includes transportation as a necessary circumstance of the offense is a continuous crime within the meaning of 18 U.S.C. § 3237(a). As a result, continuous crimes are not only offenses of actual interstate transportation but include offenses of receipt from,[6] and introduction into, inter-

state commerce.[7] *See also United States v. Cattle King Packing Co., Inc.*, 793 F.2d 232, 239 n. 4 (10th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986) (Title 21, United States Code, Section 610(b) forbidding the sale, transportation, offer for sale or transportation, or receipt from transportation of adulterated meat, was analyzed as a continuous crime within the meaning of 18 U.S.C. § 3237).

Section 331(a) prohibits the introduction or delivery for introduction, or causing the delivery or introduction into interstate commerce of adulterated or misbranded foods. 21 U.S.C. § 331(a). Tangible items such as adulterated and misbranded foods cannot be introduced or delivered for introduction into interstate commerce without some form of transportation. Therefore, since transportation is a necessary circumstance of a section 331(a) offense, a section 331(a) violation is a continuous crime within the meaning of 18 U.S.C. § 3237.

Venue for a continuous crime lies in any district from, through, or into which the prohibited interstate commerce moves. *See* 18 U.S.C. § 3237(a). Venue, under sec-

tion 3237, includes the entire area through which the force propelled by defendants operates. *United States v. Cores*, 356 U.S. 405, 408, 78 S.Ct. 875, 877–78, 2 L.Ed.2d 873 (1958).

Having determined that a section 331(a) offense is a continuous crime, the Court must determine whether venue lies in this district. Adulterated and misbranded apple juice concentrate was allegedly manufactured in this district by Food Complex. Indictment, ¶ 16. When the Beech-Nut Corporation wanted foods labeled as apple juice concentrate, it would notify Kaplansky's broker located in this district. *Id.*, ¶¶ 24, 5. Defendants allegedly shipped apple juice concentrate from this district and caused the introduction or delivery for introduction into interstate commerce of adulterated apple juice from this district. Given these allegations, it is beyond dispute that forces propelled by the defendants operated in this district. *See United States v. Sullivan*, 332 U.S. 689, 696, 68 S.Ct. 331, 335–36, 92 L.Ed. 297 (1948). Therefore, under section 3237(a) venue is proper in this district and defendants' motions are denied.[8]

IV. *Multiplicity*

Defendants move to compel election between alleged multiplicitous counts.[9] The indictment identifies numerous shipments of apple juice products introduced into interstate commerce. For each shipment, the named defendants are charged with two counts under the same statute,[10] one count for violating section 331(a) by introducing into interstate commerce adulterated foods as defined by 21 U.S.C. §§ 342(b)(1) and 342(b)(2) and another count for violating § 331(a) by introducing into interstate commerce misbranded food as defined by 21 U.S.C. §§ 343(a)(1), 343(b), 343(i)(2) and 343(k).

Defendants' argument centers on the act of introduction into interstate commerce. They claim, in somewhat of an oxymoronic fashion, that introducing adulterated foods and introducing misbranded foods in interstate commerce require the same criminal conduct. Therefore, a single act of introduction into interstate commerce of foods which are adulterated, misbranded, or both, constitutes a single section 331(a) offense.

They conclude that, by charging separate section 331(a) violations for each act of introduction, the indictment is multiplicitous.

The Beech-Nut defendants also argue that Counts One Hundred Nineteen through One Hundred Twenty-seven and Three Hundred Nine through Three Hundred Seventeen are multiplicitous in another respect.[11] They claim that although the shipments at issue in these counts were separate and occurred on different days, the shipments were part of a single "continuous" act of introduction.

In light of the inevitable prejudice created by a 470 count indictment, defendants request that the Court compel the Government to elect before trial.

Before trial, a court may, in its discretion, compel election between multiplicitous counts, if the mere making of the charges would prejudice the defendants in the eyes of the jury. *United States v. Reed*, 639 F.2d 896, 904 n. 2 (2d Cir.1981) (citing 1 C. Wright, *Federal Practice and*

Procedure § 145, at 336 (1969)). The Court must first determine if the challenged counts are multiplicitous. Multiplicity is the charging of a single offense in several counts. 1 C. Wright, *Federal Practice and Procedure* § 142, at 469 (2d ed. 1982). Whether charges are multiplicitous is, in important part, a question of legislative intent. In the absence of pertinent legislative history, congressional intent will be determined by applying the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) (whether each offense requires proof of a fact which the other does not); *Ball v. United States*, 470 U.S. 856, 861, 105 S.Ct. 1668, 1672, 84 L.Ed.2d 740 (1985).

The food legislation was meant to protect the people (i) against unwholesome foods and (ii) against deception in the sale of commodities. S.Rep. No. 301, 58th Cong., 2d Sess. 11, 14, 21, 22 (1906). The legislative history of 21 U.S.C. § 331(a) indicates that a single shipment of "misbranded AND adulterated" food may constitute separate offenses.

Moreover, the *Blockburger* test confirms Congress' intent to provide separate offenses for violating section 331(a) by introducing adulterated AND misbranded foods in interstate commerce.

Section 331(a) must be read in conjunction with 21 U.S.C. § 342, defining adulterated foods, and 21 U.S.C. § 343, defining misbranded foods. According to *Blockburger*, charges are multiplicitous if proving one offense necessarily proves the other. The question here is whether the crime of introducing adulterated food into interstate commerce requires proof of an element which is not required in proving the crime of introducing misbranded foods into interstate commerce. The answer is yes. A food is adulterated if it is diluted or depreciated in quality, if it fails to come to the standards set by law as to ingredients, or to which any foreign substance, wholesome or unwholesome, is added. *Ballantine's Law Dictionary* 39 (3rd ed. 1969); *see also* 21 U.S.C. § 342. On the other hand, a food is misbranded if its label is false or misleading.[12] *Ballentine's Law Dictionary* 805 (3rd ed. 1969); *see also* 21

U.S.C. § 343. These definitions clearly show that a product may be misbranded without necessarily being adulterated and vice versa. Therefore, one who violates section 331(a) by introducing adulterated foods into interstate commerce does not necessarily violate section 331(a) for introducing misbranded foods. Therefore, one shipment of adulterated AND misbranded foods introduced into interstate commerce may constitute two separate section 331(a) offenses. *Contra United States v. Bel-Mar Laboratories, Inc.*, 284 F.Supp. 875 (E.D.N.Y.1968); *United States v. Success Chemical Co.*, No. 63 CR 434 (E.D.N.Y. Feb. 13, 1964) (In neither of these cases, however, did the Court consider the legislative history of § 331(a) or apply the *Blockburger* test). Accordingly, the previously challenged counts are not multiplicitous.

The Beech-Nut defendants also argue that Counts One Hundred Nineteen through One Hundred Twenty-seven and Three Hundred Nine through Three Hundred Seventeen are multiplicitous in an additional respect. They claim that although

the shipments at issue in these counts were allegedly separate and occurred on different days, the shipments were part of a single "continuous" act of introduction.

In addition, the Beech-Nut defendants, joined by Kaplansky, Shaeffer and Williamson, move to compel election between mail fraud counts. 18 U.S.C. § 1341. Under 18 U.S.C. § 1341, each mailing is a separate offense. *United States v. Johnpoll*, 739 F.2d 702, 715 (2d Cir.), *cert. denied*, 469 U.S. 1075, 105 S.Ct. 571, 83 L.Ed.2d 511 (1984) (citing *Badders v. United States*, 240 U.S. 391, 394, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916)). Defendants argue that Counts Three, Four, Fifteen and Sixteen are multiplicitous because the alleged mailings occurred on the same day.

Until the Government actually submits evidence in support of the indictment, it is impossible to determine whether any of these additional Counts [13] are multiplicitous or not. *See United States v. Vinieris*, 595 F.Supp. 88, 92 (S.D.N.Y.1984). Accordingly, defendants' motions to compel election between multiplicitous counts are dismissed as premature.

V. *Severance*

The Beech-Nut defendants move for a severance on the basis of improper joinder under Rule 8(b), Fed.R.Crim.P., or prejudicial joinder pursuant to Rule 14, Fed.R. Crim.P. They argue that joinder is improper under Rule 8(b) because the indictment alleges multiple conspiracies (Count One) and multiple schemes to defraud (Counts Two through Twenty-one).

Rule 8(b) permits joinder of two or more defendants in a single indictment where the defendants are alleged to have participated in the same transaction or series of acts or transactions which are part of a common scheme or plan. Fed.R.Crim.P. 8(b).

In denying defendants' motions to dismiss Count One for alleging multiple conspiracies and Counts Two through Twenty-one for failure to allege a common scheme to defraud, this Court held that the present indictment properly charges defendants with participating in a single conspiracy and a common scheme to defraud. By definition, defendants allegedly engaged in the same series of acts or transac-

tions and common scheme to defraud. Therefore, joinder is proper under Rule 8(b), Fed.R.Crim.P. *See United States v. Bernstein*, 533 F.2d 775, 789 (2d Cir.), *cert. denied*, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1976); *United States v. Santoro*, 647 F.Supp. 153, 178–79 (E.D.N.Y. 1986).

The Beech-Nut defendants also seek severance pursuant to Rule 14 on the basis of antagonistic defenses, prejudicial spillover and the Government's alleged inability to prove a single conspiracy. Fed.R.Crim.P. 14. Beech-Nut defendants assert that their defense is lack of knowledge and speculate that the Suppliers' defense will be lack of intent to defraud. Beech-Nut defendants simply repeat their "unknowing victim" theory. They were unaware of the adulterated nature of the concentrate purchased from the Suppliers. They never conspired with the Suppliers and never participated in a common scheme to defraud with the Suppliers. The Beech-Nut defendants compare their lack of knowledge defense with the Suppliers' anticipated lack of intent to defraud defense and conclude

that these defenses are antagonistic and warrant severance.

When seeking severance on the basis of antagonistic defenses, defendants must do more than merely anticipate that one defendant may try to save himself at the expense of the other. *United States v. Papadakis*, 572 F.Supp. 1518, 1521 (S.D.N.Y.1983), *aff'd*, 739 F.2d 784 (2d Cir.), *cert. denied*, 469 U.S. 918, 105 S.Ct. 297, 83 L.Ed.2d 232 (1984). A defendant must show that the defenses are irreconcilable. Severance is required only upon a showing that the jury, in order to believe the core of the testimony offered on behalf of one defendant, must necessarily disbelieve the testimony offered in favor of another defendant. *United States v. Potamitis*, 739 F.2d 784, 790 (2d Cir.), *cert. denied*, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269 (1984).

Assuming that the defenses set forth by the Beech-Nut defendants are presented at trial, the level of antagonism between the asserted defenses does not mandate severance. A jury could easily

believe one defense without disbelieving the other. Therefore, although the alleged defenses may not be identical, they are not irreconcilable. *See United States v. Carpentier*, 689 F.2d 21, 28 (2d Cir.), *cert. denied*, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 957 (1983).

Beech-Nut defendants also argue that severance should be granted because a joint trial would result in prejudicial spillover. They anticipate that the Government's evidence of Beech-Nut defendants' knowledge will be bland and innocuous. In contrast they envision the Government casting Supplier defendants as deceitful and "unscrupulous swindlers." In their view the prejudicial spillover warrants severance.

In determining whether to grant or deny severance under Rule 14, Fed.R. Crim.P., on the basis of prejudicial spillover, the Court must consider the amount of spillover and whether the prejudice can be cured by a proper jury instruction. *See United States v. Carson*, 702 F.2d 351, 366–67 (2d Cir.), *cert. denied*, 462 U.S.

1108, 103 S.Ct. 2456, 77 L.Ed.2d 1335 (1983).

In our opinion, the Beech-Nut defendants have greatly exaggerated the risk of prejudicial spillover. They forget that the Government, in addition to proving Beech-Nut's knowledge, will also attempt to prove that Beech-Nut defendants conspired and entered into a scheme to defraud with Supplier defendants. In other words, the Government's case against the Beech-Nut defendants may not be as bland and innocuous as defendants claim. As in most multidefendant cases, there will undoubtedly be a certain amount of spillover. However, a proper jury instruction should adequately compartmentalize the evidence as to each count and each defendant and should cure any prejudice. *See United States v. Losada*, 674 F.2d 167, 171 (2d Cir.), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982).

As a general rule, persons indicted together should be tried together. *United States v. Ventura*, 724 F.2d 305, 312 (2d Cir.1983). To overcome the presumption in

favor of joint trials, defendants must prove that a joint trial would result in substantial prejudice and deny them a fair trial. *United States v. Cody*, 722 F.2d 1052, 1061 (2d Cir.1983), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1984); *United States v. Persico*, 621 F.Supp. 842, 852 (S.D.N.Y.1985), *aff'd*, 804 F.2d 185 (2d Cir. 1986). Defendants have not sustained their burden of proof. Accordingly, defendants' motion to sever must be denied.

In connection with their severance motion, Beech-Nut defendants claim that the Government will be unable to prove a single conspiracy. Therefore, the Court should direct the Government to produce a preliminary proffer of evidence on the conspiracy and mail fraud counts before determining whether severance should be granted.

This Court has held that the indictment properly alleges a single conspiracy and a single scheme to defraud. Thus, defendants' request is denied.

VI. *Vagueness and Failure to State a Claim*

Beech-Nut defendants move to dismiss Counts Twenty-two through Four Hundred Fifty for vagueness and failure to state an offense. They argue that the act of introduction is an essential element of a section 331(a) offense. 21 U.S.C. § 331(a). Therefore, the indictment should allege the exact origin and destination of each shipment. In the absence of such allegations, Beech-Nut defendants argue that the indictment should be dismissed for vagueness and failure to state an offense.

An indictment is adequate if it contains the essential elements of the offense, sufficiently apprises the defendants of what they must be prepared to meet and is detailed enough to assure against double jeopardy. *Wong Tai v. United States*, 273 U.S. 77, 80–81, 47 S.Ct. 300, 301–302, 71 L.Ed. 545 (1927); *United States v. Chawla*, 482 F.Supp. 1136, 1140 (E.D.N.Y.1980). In this Circuit indictments are sustained if they do little more than track the language

of the statute and state the time and place of the offense in approximate terms. *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir.1973).

The present indictment tracks the language of the statute. It identifies the dates of each shipment, the products shipped and the recipients of the shipments. The indictment need not allege the exact site where each introduction into interstate commerce occurred. All the shipments originated in "the Eastern District of New York and elsewhere" and were sent to locations outside the State of New York. The allegations showing that the adulterated or misbranded foods moved in interstate commerce satisfy the interstate commerce element of the offense. Counts Twenty-two through Four Hundred Fifty satisfy the *Wong Tai* requirements.

Accordingly, defendants' motion is denied.

Hoyvald, joined by Lavery and Williamson, moves to dismiss mail fraud Counts Four, Five, Seven, Eight, Nine and

Fifteen for vagueness. For each mail fraud Count, the indictment provides a Beech-Nut document number, the date and recipient of the mailing. Counts Four, Five and Seven refer to the same document number, B11379, and Counts Eight, Nine and Fifteen refer to document number B11849. Hoyvald argues that Counts Four, Five, Seven, Eight, Nine and Fifteen should be more specific and identify what type of papers, the documents numbered B11379 and B11849 actually are. He argues that if Counts Four, Five, Seven, Eight, Nine and Fifteen are based on separate mailings of the same document, the Counts should be dismissed for vagueness.

We previously held that the mail fraud Counts properly allege the essential elements of the crime. Each use of the mail is a separate offense. *United States v. Johnpoll*, 739 F.2d 702, 715 (2d Cir.), *cert. denied*, 469 U.S. 1075, 105 S.Ct. 571, 83 L.Ed.2d 511 (1984). Therefore, Counts Four, Five, Seven, Eight, Nine and Fifteen are sufficiently specific and Hoyvald's motion is denied.

VII. *Prosecutorial Misconduct*

Defendant Hoyvald, joined by Lavery, seeks to dismiss the indictment based on alleged prosecutorial misconduct during the grand jury investigation of this case. Alternatively, Hoyvald requests an evidentiary hearing on the issue of grand jury abuse.

Hoyvald claims that the Government erred in allegedly (1) presenting false and irrelevant evidence to the grand jury, (2) withholding exculpatory evidence from the grand jury, (3) misinforming the grand jury as to the pertinent law, (4) presenting evidence of Hoyvald's nationality, and (5) admitting an unauthorized person into the grand jury room. Hoyvald argues that as a result of these incidents, the grand jury was biased and thus the indictment should be dismissed.

"An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial on the merits," *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956). An indictment will be

dismissed on the grounds of prosecutorial misconduct in very limited and extreme circumstances. Dismissal is warranted in cases of long standing, widespread and continuous official misconduct or where lesser sanctions could not cure the prejudice caused to defendants. *United States v. Broward*, 594 F.2d 345, 351 (2d Cir.), *cert. denied*, 442 U.S. 941, 99 S.Ct. 2882, 61 L.Ed.2d 310 (1979); *United States v. Sam Goody, Inc.*, 506 F.Supp. 380, 392 (E.D.N.Y.1981).

Defendant's claims do not constitute grounds for dismissal of the indictment. First, courts do not review the credibility of grand jury witnesses. *United States v. Guillette*, 547 F.2d 743, 753 (2d Cir.1976), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977). Second, the Government is under no obligation to present to the grand jury evidence favorable to the defendant. *United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979). Third, misinforming the grand jury as to the applicable law does not constitute grounds for dismissal. *United States v.*

Buchanan, 787 F.2d 477, 487 (10th Cir. 1986); *United States v. DePalma*, 461 F.Supp. 778, 796 (S.D.N.Y.1978). Fourth, the evidence of defendant's nationality was too innocuous to warrant dismissal of the indictment. *See United States v. Ajlouny*, 476 F.Supp. 995, 999 (E.D.N.Y.1979), *aff'd on other grounds*, 629 F.2d 830 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111, 101 S.Ct. 920, 66 L.Ed.2d 840 (1981) (evidence of defendant's P.L.O. connection did not warrant dismissal of the indictment). Fifth, the record belies defendant's claim that an unauthorized person was admitted into the grand jury room.

Accordingly, defendant's motion is dismissed and his request for a hearing denied.

VIII. *Discovery*

Defendants filed motions for discovery and a bill of particulars. They have asked this Court to require the production of all the Government's files in this case.

The Government has made available to defendants over 30,000 documents. This

Court has repeatedly suggested that the defendants pare down their discovery demands as their requests were met. Defendants have arbitrarily refused and have made no effort whatsoever to do so. Not a single discovery motion has been withdrawn to date.

This Court believes that the Government's 30,000 documents must have answered a great many, if not all, of defendants' requests and will not reward the defendants for their intransigent behavior. We are persuaded that the Government has fulfilled its obligations. Therefore, the discovery and bill of particulars motions are denied.

Finally, defendant Hoyvald has filed (1) a motion pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure requesting a pre-trial return date for trial subpoenas *duces tecum*, (2) a motion under Fed.R. Crim.P. 15 for permission to take depositions and to issue letters rogatory, and (3) a motion for additional time to file motions to suppress and other pre-trial motions.

A return date for trial subpoenas *duces tecum* is hereby set for July 31, 1987. In addition, defense counsel should confer with counsel for the Government and attempt to stipulate as to necessary depositions and letters rogatory. If an agreement is reached, the Court will "so order" such stipulations. If an agreement is not reached, the parties should serve and file notices to take needed depositions and motions, on 10–day notice, asking for leave to serve letters rogatory. Defendants' request for additional time to serve and file motions to suppress and other pre-trial motions is granted. All additional motions, however, must be made by service of appropriate notices of motions within fourteen (14) days of the date of filing of this Memorandum.

SO ORDERED.

1. Paragraph 10 of the indictment alleges the following:

> From on or about and between the 1st day of October 1978, to the 31st day of March 1983, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants, BEECH-NUT, NIELS L. HOYVALD, JOHN F. LAVERY, ZEEV KAPLANSKY, RAYMOND H. WELLS, NINA B. WILLIAMSON, SOUTH ORANGE EXPRESS, INC., and DANNY A. SHAEFFER, and others known and unknown to the Grand Jury, did unlawfully, willfully, and knowingly, combine, conspire, confederate, and agree to violate the Federal Food, Drug, and Cosmetic Act, Title 21, United States Code, Sections 331(a) and (k), and 333(b).

2. Section 331(a) provides in part:

> The following acts and causing thereof are prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food ... that is adulterated or misbranded.

3. Section 331(k) provides in part:

> (k) The alteration ... of the whole or any part of the labeling of, or the doing of any other act with respect to, a food ... if such act is done while such article is held for sale ... after shipment in interstate commerce and results in such article being adulterated or misbranded.

4. Section 333(b) provides in part:

> (b) ... If any person ... commits such a violation [of a provision of § 331] with the intent to defraud or mislead....

5. Paragraph 18 of the indictment alleges the following:

> From on or about and between the 1st day of October 1978, to the 31st day of March 1983, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants BEECH-NUT, NIELS L. HOYVALD, JOHN F. LAVERY, ZEEV KAPLANSKY, RAYMOND H. WELLS, NINA B. WILLIAMSON, SOUTH ORANGE EXPRESS, INC., and DANNY A. SHAEFFER devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations, and promises, from buyers of foods labeled as, and otherwise represented to be, apple juice concentrate, apple juice and juices containing, in part, apple juice, well knowing that said pretenses, representations, and promises would be and were false and fraudulent when made.

6. *E.g.*, 18 U.S.C. §§ 2313, 2315, 2317 and 21 U.S.C. § 331(c).

7. *E.g.*, 21 U.S.C. § 331(a).

8. Our finding that section 331 is a continuous crime is further supported by the interstate

character of the FFDCA. The Act was not meant to protect the commerce of food in one discrete geographical area. The FFDCA is an overall scheme designed to protect the interstate flow of goods from the moment of introduction into interstate commerce until the moment of delivery to the ultimate customer. *United States v. Sullivan*, 332 U.S. 689, 696, 68 S.Ct. 331, 335–36, 92 L.Ed. 297 (1948).

9. Although named in different counts the different defendants allege the same theory. Beech-Nut defendants claim that Counts Twenty-two through Two Hundred Thirty-six and Two Hundred Thirty-seven through Four Hundred Fifty are multiplicitous and Shaeffer challenges Counts Four Hundred Fifty-one through Four Hundred Sixty and Four Hundred Sixty-one through Four Hundred Seventy.

10. Counts Twenty-two through Two Hundred Thirty-six allege that Beech-Nut defendants violated section 331(a) by introducing into interstate commerce adulterated foods as defined by 21 U.S.C. §§ 342(b)(1) and 342(b)(2). Counts Two Hundred Thirty-seven through Four Hundred Fifty charge the same defendants with violating section 331(a) because the same shipments were misbranded as defined by 21 U.S.C. §§ 343(a)(1), 343(b), 343(i)(2) and 343(k). Counts Four Hundred Fifty-one through Four Hundred Sixty charge defendant Shaeffer with introducing adulterated foods into interstate commerce in violation of 21 U.S.C. § 331(a).

Counts Four Hundred Sixty-one through Four Hundred Seventy charge the same defendant with violating section 331(a) because the same shipments were misbranded.

11. Counts One Hundred Nineteen through One Hundred Twenty-three refer to shipments of adulterated apple juice to Imperial Warehouse on August 12, 1982. Counts Three Hundred Nine through Three Hundred Thirteen allege that the same shipments were misbranded. Counts One Hundred Twenty-three through One Hundred Twenty-seven refer to shipments of adulterated apple juice products to the same customer on August 13, 1982. Counts Three Hundred Thirteen through Three Hundred Seventeen allege that the same shipments were misbranded.

12. *United States v. Articles of Food ... "Manischewitz ... Diet Thins"*, 377 F.Supp. 746 (E.D.N.Y.1974) (label was misleading as to its dietary use).

13. Counts One Hundred Nineteen through One Hundred Twenty-seven, Three Hundred Nine through Three Hundred Twelve and mail Counts Three, Four, Fifteen and Sixteen.

(2)

No. 89-216

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN F. LAVERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether petitioner, who was convicted of conspiracy to introduce adulterated and misbranded apple juice into interstate commerce, was entitled to a judgment of acquittal on the ground that the suppliers of the concentrate used to make the juice intended to mislead petitioner's company about the nature of the concentrate.

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JOHN F. LAVERY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A78) is reported at 871 F.2d 1181. The opinion of the district court (Pet. App. A80-A121) is reported at 659 F. Supp. 1487.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on March 29, 1989. A petition for rehearing was denied on June 8, 1989 (Pet. App.

A79). The petition for a writ of certiorari was filed on August 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to introduce misbranded apple juice product into interstate commerce, in violation of 18 U.S.C. 371; 18 counts of mail fraud, in violation of 18 U.S.C. 1341; and 429 counts of introducing adulterated and misbranded apple juice into interstate commerce, in violation of 21 U.S.C. 331(a) and 342(b)(1) and (2). He was sentenced to concurrent terms of imprisonment for one year and one day, he was fined a total of $100,000, and he was ordered to pay the costs of prosecution. The court of appeals affirmed in part and reversed in part. Pet. App. A3-A78.

1. Petitioner is the former vice-president in charge of operations of the Beech-Nut Nutrition Corporation. In that capacity, he was responsible for purchasing and processing the apple juice concentrate used in Beech-Nut products. Beech-Nut labelled, advertised, and marketed its apple juice as pure fruit juice, free from sugar additives. Pet. App. A6-A7.

In 1977, the Universal Juice Company became Beech-Nut's sole supplier of apple juice concentrate. One year later, Dr. Jerome LiCari, Beech-Nut's director of research and development, became aware that the Universal concentrate might be adulterated.[1]

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[1] A food is deemed to be adulterated within the meaning of 21 U.S.C. 342(b) if "any valuable constituent has been in whole or in part omitted or abstracted therefrom" or "any substance has been substituted wholly or in part therefor."

LiCari reported that information to petitioner, who dispatched two employees to inspect Universal's blending facilities. The inspection revealed that although Universal maintained a warehouse, it had no blending facilities. Pet. App. A7-A8. Following that discovery, petitioner did not stop using Universal as Beech-Nut's supplier of concentrate. Instead, he required Universal to give Beech-Nut a "hold harmless" agreement, designed to protect Beech-Nut against potential legal claims concerning the content of the juice. *Ibid.*

LiCari continued to warn petitioner that the Universal concentrate might be adulterated. Petitioner insisted, however, that because the Universal concentrate was far less expensive than other concentrates, he would not change suppliers unless test results proved, in a court of law, that the Universal product was adulterated. Petitioner also ordered LiCari to assign a low priority to any future testing of the concentrate. Pet. App. A8-A9.

In 1979, outside laboratory tests confirmed that certain lots of the Universal concentrate consisted primarily of corn syrup, rather than apple juice. Petitioner learned of those tests, but took no action. Thereafter, a Beech-Nut plant manager informed petitioner that 95,000 pounds of Universal concentrate in the Beech-Nut inventory was adulterated, and he suggested that the company demand its money back. Instead, petitioner directed the plant manager to use the adulterated concentrate in Beech-Nut mixed juices. Pet. App. A9-A10.

On many other occasions, petitioner was advised that the Universal concentrate was not apple juice. Following one such warning, petitioner threatened to fire LiCari. In 1981, Beech-Nut received an un-

solicited report from a Swiss laboratory, stating that the Company's apple juice product was not only adulterated, but in fact contained no apple juice. Petitioner continued to use Universal as a supplier. Pet. App. A10-A11.

In June 1982, petitioner was visited by a detective employed by the Processed Apple Institute. The detective informed petitioner that Beech-Nut would soon be involved in a lawsuit that would expose the Company's use of adulterated concentrate. Only then did petitioner terminate Universal as Beech-Nut's supplier. In addition, petitioner ordered that the concentrate in Beech-Nut's New York facilities be destroyed or returned to Universal; however, he also ordered the Company's San Jose, California, facility to continue using its adulterated concentrate for making Beech-Nut apple juice products. Pet. App. A12-A13.

2. In November 1986, Beech-Nut, its president, Niels L. Hoyvald, petitioner, and the concentrate suppliers were indicted in the Eastern District of New York on charges relating to Beech-Nut's sales of misbranded and adulterated apple juice. Pet. App. A17-A18. Count 1 of the indictment alleged that Beech-Nut and its officers, including petitioner, had conspired with the concentrate suppliers to violate the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 331(a) and (k), 333(b), by introducing adulterated and misbranded foods into interstate commerce. Pet. App. A83-A84.

Before trial, petitioner moved to dismiss Count 1 on the ground that it improperly alleged multiple conspiracies—one conspiracy involving the suppliers' attempt to defraud Beech-Nut by selling it adulterated and misbranded concentrate, and a second con-

spiracy among Beech-Nut officials to defraud consumers through the sale of adulterated and misbranded apple juice. Pet. App. A87-A88. The district court denied the motion, concluding that Count 1 alleged "a single conspiracy with multiple objects." *Id.* at A89. At trial thereafter, the court refused to instruct the jury that petitioner could not be convicted of conspiring with the suppliers if the jury found that the suppliers sought to defraud Beech-Nut. *Id.* at A40.

3. The court of appeals reversed petitioner's FFDCA convictions on venue grounds, but it affirmed his convictions on the mail fraud and conspiracy counts. Pet. App. A3-A78. The court explained that the "matter of whether the evidence has established one conspiracy or more than one is a question of fact for a properly instructed jury." *Id.* at A38. In the present case, the court held, the jury was properly instructed on the differences between multiple and single conspiracies. *Id.* at A39-A40. Moreover, the court stated, there was sufficient evidence to support the conspiracy conviction, notwithstanding petitioner's contention that Universal had sought to defraud Beech-Nut. In particular, the court noted, petitioner had refused "to heed the warnings of Beech-Nut's own staff"; he had directed his scientific staff "to make analysis of the concentrate a low priority item"; and he had known that Beech-Nut "was paying substantially less for the concentrate it bought from [Universal] than it had for the concentrate previously obtained from reputable suppliers." *Id.* at A40-A41. The court concluded that even if Beech-Nut and its officers (including petitioner) and the suppliers " 'were eager to cheat each other for a large slice of the spoils,' " that fact did not " 'obscure the

unifying means used by all of them to defraud the public.' " *Id.* at A40.

ARGUMENT

Petitioner contends (Pet. 6-9) that Universal intended to defraud Beech-Nut about the nature of the concentrate, and that, as a result, there could not be a single conspiracy between Beech-Nut and its suppliers. Rather, in petitioner's view, there were *two* conspiracies, one among the concentrate suppliers to defraud Beech-Nut and another involving petitioner and other Beech-Nut officials to defraud the public.

That contention is meritless. "The question whether there are one or more conspiracies is primarily for the jury, since it is a question of fact as to the nature of the agreement." *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976). In the present case, the jury was properly instructed on the law. Moreover, there was plainly sufficient evidence to support the jury's finding that petitioner conspired with the concentrate suppliers. For example, although petitioner was repeatedly warned that Universal was selling adulterated concentrate to Beech-Nut, he actively discouraged efforts to test the concentrate. He also ordered additional purchases of the product, and he continued to sell Beech-Nut products labelled "pure apple juice" even after he learned that those products were made from a sugar-syrup concentrate. In addition, the substantial savings attributable to using the cheap, bogus concentrate gave petitioner a significant financial stake in the continued success of the venture.

Finally, even if, as petitioner contends, Universal intended to defraud Beech-Nut with respect to the content of the concentrate, that would not preclude the suppliers and Beech-Nut from reaching an agree-

ment to defraud the public. As the court of appeals noted, "coconspirators need not agree on [all of the] details of [the] conspiracy," as long as the "essential nature of [the] plan is agreed on." Pet. App. A38. In the present case, the jury could easily have concluded that, whatever their original intentions, the suppliers and Beech-Nut both understood the true nature of the concentrate and agreed to market the final product to an unsuspecting public as pure apple juice.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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[2] Petitioner notes in passing (Pet. 8 n.12) that his challenge to the conspiracy conviction applies "somewhat differently" to the mail fraud convictions. For similar reasons, however, petitioner's challenge to the mail fraud counts is meritless. Even if, as petitioner suggests, Universal initially hoped to mislead Beech-Nut about the concentrate, there is no reason why the suppliers and Beech-Nut could not ultimately formulate a common "scheme or artifice to defraud" (18 U.S.C. 1341) the public about the final product.

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